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APPENDIX FOR APPELLANTS

United States Court of Appeals for the Fourth Circuit

No. 7438.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, AND J. J. BREWBAKER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE CITY OF NORFOLK, VIRGINIA,

Appellants,

v.

LEOLA PEARL BECKETT, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk

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COMPLAINT

I. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, Section 1, and the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), as hereinafter more

fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28, United States Code, Section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13 (Title 42, United States Code, Section 1983), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and by the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereinafter more fully appears.

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the City of Norfolk, Virginia. They are within the statutory age limits of eligibility to attend the public schools of said City, and possess all qualifications and satisfy all requirements for admission thereto, and are in fact attending public schools of said City operated by defendants.

3. Adult plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the City of Norfolk, Virginia. They are parents or guardians of the infant plaintiffs, and are taxpayers of the United States and of said Commonwealth and City. All adult plaintiffs having control

or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

4. Plaintiffs bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attending the public schools in the City of Norfolk, Virginia, and their respective parents and guardians, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought, as will hereinafter more fully appear, bring this action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as a class action, also on behalf of all other Negro children attending the public schools in the City of Norfolk, Virginia, and their respective parents and guardians, similarly situated and affected with reference to the matters here involved.

5. Defendant The School Board of the City of Norfolk, Virginia, exists pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth of Virginia discharging governmental functions (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2, 22-5 to 22-9.3, Chapter 6, Article 1, Sections 22-45 to 22-58, Chapter 6, Article 4, Sections 22-89 to 22-99, Chapters 7 to 15, Sections 22-101 to 22-380); and is declared by law to be a body corporate (Code of Virginia, 1950, Chapter 6, Article 4, Section 22-94).

6. Defendant J. J. Brewbaker is Division Superintendent of Schools of the City of Norfolk, Virginia. He holds office pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2, 22-5 to 22-9.3, Chapter 4, Sections 22-31 to 22-40, Chapters 6 to 15, Sections 22-45 to 22-330). He is under the authority, supervision and control of, and acts pursuant to, the orders, policies, practices, customs and usages of defendant The School Board of the City of Norfolk, Virginia. He is made a defendant herein in his official capacity.

7. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

> "Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia of 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

8. The public schools of the City of Norfolk, Virginia, are under the control and supervision of defendants, acting as an administrative department or division of the Commonwealth of Virginia (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-2). Defendant The School Board of the City of Norfolk, Virginia, is empowered and required to establish and maintain an efficient system of public free schools in said City (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1, 22-5); to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same (Code of Virginia, 1950, Title 22, Chapter 1, Article 1, Section 22-97); to determine the studies to be pursued, the methods of teaching, and the government to be employed in the schools (Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97, Chapter 12, Article 2, Sections 22-233 to 22-240.1); to employ teachers (Code of Virginia, 1950, Chapter 6, Article 4, Section 22-97, Chapter 11, Section 22-203); to provide for the transportation of pupils (Code of Virginia, 1950, Title 22, Chapter 13, Articles 1 and 2, Sections 22-276 to 22-294); to enforce the school laws (Code of Virginia, 1950, Title 22, Chapter 6, Article 4, Section 22-97); and to perform the numerous other duties, activities and functions essential to the establishment, maintenance and operation of the schools of said City (Code of Virginia, 1950, Title 22, Chapter 1, Sections 22-1 to 22-10, Chapters 4 to 5, Sections 22-30 to 22-44, Chapter 6, Article 1, Sections 22-45 to 22-58, Article 4, Sections 22-89 to 22-100, Chapters 7 to 15, Sections 22-101 to 22-330).

9. Defendants, and each of them, and their agents and employees, maintain and operate separate public schools for Negro and white children, respectively, and deny infant plaintiffs and all other Negro children, because of their race

or color, admission to and education in any public school operated for white children, and compel infant plaintiffs and all other Negro children, because of their race or color, to attend public schools set apart and operated exclusively for Negro children, pursuant to a policy, practice, custom and usage of segregating, on the basis of race or color, all children attending the public schools of said City.

10. The aforesaid action of defendants denies infant plaintiffs, and each of them, their liberty without due process of law and the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and the rights secured by Title 42, United States Code, Section 1981.

11. On May 17, 1954, the Supreme Court of the United States declared the principle that state-imposed racial segregation in public education is violative of the Fourteenth Amendment of the Constitution of the United States. A formal demand has heretofore been made on behalf of plaintiffs and all other persons similarly situated that defendants conform to said decision and cease and desist from the policy, practice, custom and usage specified in paragraph 9 hereof. Notwithstanding, defendants, and each of them, refuse to act favorably upon this demand and purposefully, wilfully and deliberately continue to enforce and pursue said policy, practice, custom and usage against infant plaintiffs and all other Negro children.

12. Defendants will continue to pursue against plaintiffs, and all other Negro children similarly situated, the policy, practice, custom and usage specified in paragraph 9 hereof, and will continue to deny them admission, enrollment or education to and in any public school operated for children

residing in said City who are not Negroes, unless restrained and enjoined by this Court from so doing.

13. Plaintiffs, and those similarly situated and affected, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the policy, practice, custom and usage and the actions of the defendants herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this complaint for an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as would deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury and occasion damage, vexation and inconvenience.

14. As a consequence of the purposeful, wilful and deliberate action of defendants, in continuing, in violation of their legal duty to plaintiffs, to segregate infant plaintiffs and other Negro children on the basis of their race or color, plaintiffs are required to employ attorneys and undergo great trouble, inconvenience and expense to litigate a vindication of their constitutional rights.

WHEREFORE, plaintiffs respectfully pray that, upon the filing of this complaint, as may appear proper and convenient, this Court advance this action on the docket and order a speedy hearing of this action according to law and, upon such hearing:

(a) This Court enter a preliminary injunction and/or a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees, forthwith, from enforcing or pursuing

against infant plaintiffs and other Negro children similarly situated the policy, practice, custom and usage specified in paragraph 9 hereof, and/or any other policy, practice, custom or usage of the same or similar purport, and/or any action whether or not pursuant to said policy, practice, custom or usage which precludes, on the basis of race or color, the admission, enrollment or education of infant plaintiffs or any other Negro child similarly situated to and in any public school operated by defendants at the same time, and under the same terms and conditions, and with the same treatment, that similarly situated children of any other race, color or group are admitted, enrolled, educated or given therein, upon the ground that any such policy, practice, custom, usage or action denies infant plaintiffs, and other Negro children similarly situated, their liberty without due process of law and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and the rights secured by Title 42, United States Code, Section 1981, and is for these reasons unconstitutional and void.

(b) This Court allow plaintiffs their costs herein, and reasonable attorneys' fees for their counsel, and grant such further, other, additional or alternative relief as may appear to the Court to be equitable and just in the premises.

ANSWER

In answer to the complaint heretofore filed in this action, defendants say:

1. Defendants deny the jurisdiction of the Court as set forth in the allegations of Paragraph 1(a) of the complaint. As to the allegations of Paragraph 1(b) of the complaint,

the defendants allege that the Court does not have jurisdiction in this action because the complaint does not state a case or controversy upon which relief can be granted.

2. Defendants are not advised as to the truth of the allegations of Paragraph 2 of the complaint and call for strict proof of all such allegations.

3. Defendants are not advised as to the truth of the allegations of Paragraph 3 of the complaint and call for strict proof of all such allegations, except that defendants admit the allegation of Paragraph 3 regarding the compulsory school attendance law of Virginia.

4. Defendants deny the allegations of fact and the conclusions of law contained in Paragraph 4 of the complaint, and with respect to the allegations of said Paragraph 4 defendants state that if this be a class action as contended by the plaintiffs, the only persons coming within said class are Negro citizens of the United States residing in the Commonwealth of Virginia who are otherwise duly qualified for admission to the public schools of Norfolk, Virginia, and who have applied for and been denied such admission.

5. Defendants admit the allegations of Paragraph 5 of the complaint.

6. Defendants admit that J. J. Brewbaker is Division Superintendent of Schools in the City of Norfolk, Virginia, and that he holds office pursuant to the Constitution and laws of the Commonwealth of Virginia. Defendants deny all other allegations of Paragraph 6 of the complaint.

7. Defendants admit the allegations of Paragraph 7 of the complaint.

8. Defendants admit that the administration of the public school system of Norfolk, Virginia, is administered by them. The defendant J. J. Brewbaker denies that said public schools are under his control and the defendant The School Board of the City of Norfolk, Virginia, denies that it is empowered and required to establish and maintain an efficient system of public free schools in said City. The defendants admit that their powers and duties are prescribed by Title 22 of the Code of Virginia but all other allegations of fact contained in Paragraph 8 of the complaint are denied.

9. Defendants admit they are following State policy and laws requiring the maintenance of separate schools for white and Negro children, and assert that such State policy and laws are valid and not repugnant to the Constitution of the United States but to the contrary are within the police powers of the State. Defendants deny all other allegations of Paragraph 9 of the complaint.

10. Defendants deny all the allegations of Paragraph 10 of the complaint.

11. Defendants admit that on May 17, 1954, the Supreme Court of the United States held in the case of *Brown v. Board of Education of Topeka*, 347 U. S. 483, and companion cases, that state-imposed racial segregation in public education violates the Fourteenth Amendment of the Constitution but allege that such decisions are not binding on this Court under the facts as they will be disclosed by the evidence in this case. Defendants further assert that even under the aforesaid decisions they are not required to integrate the public schools of Norfolk, Virginia, and therefore the relief sought in the complaint should be denied. Defendants deny the remaining allegations of Paragraph 11 of the complaint.

12. As to the allegations of Paragraph 12 of the complaint, Defendants deny that they are pursuing, or will pursue, a policy in denial of the rights of the Plaintiffs in this case.

13. Defendants deny all of the allegations of Paragraph 13 of the complaint.

14. Defendants deny all of the allegations of Paragraph 14 of the complaint.

15. Defendants deny all of the allegations in the complaint which are not specifically admitted in this Answer and deny that the plaintiffs are entitled to the relief sought in the complaint.

DEFENDANTS FURTHER MOVE that this action be dismissed for the following reasons:

(a) The defendant The School Board of the City of Norfolk, Virginia, alleges that this action should be dismissed as to it since it is an agency of the State of Virginia and the State has not given its consent to be sued in this action;

(b) The defendant J. J. Brewbaker alleges that as to him the complaint should be dismissed for failure to state a claim against him upon which relief can be granted;

(c) Defendants allege that this action should be dismissed on the ground of lack of jurisdiction and assert that this proceeding involves no case or controvery upon which relief should be granted.

WHEREFORE, defendants pray that this action be dismissed and the Court allow defendants their costs herein expended.

SUPPLEMENTAL MOTION TO DISMISS

The Defendants respectfully move the Court to dismiss the Complaint filed by the Plaintiffs herein on the following grounds:

On September 29, 1956, the Governor of Virginia approved Chapter 70 of the Acts of Assembly of Virginia for the Extra Session of 1956. This act, to become effective on December 28, 1956, provides a comprehensive program for the assignment of students to various schools, including provisions for administrative appeals with judicial review. A copy of this act appears on page 47 of the printed pamphlet containing all of the statutes relating to the public schools enacted at such Extra Session, and which will be made available to the Court at the hearing of this Motion. This act will be in effect before the opening of the next term of the public schools in the City of Norfolk. The act provides effective administrative procedures for the plaintiffs by which they can obtain the relief that they seek in this case to the extent that they are entitled to relief. The plaintiffs should not be permitted to seek relief now in this court until all administrative remedies provided by the act have been exhausted.

MEMORANDUM

In identical class actions certain Negro children and their parents, or others who stand in loco parentis, have instituted these suits seeking the guidance and assistance of this Court to require the defendants[1] to cease and desist from the policy, practice, custom and usage of denying the infant

[1] In addition to the local School Boards, the respective Division Superintendents of Schools are named as parties defendant in each case.

plaintiffs, solely by reason of their race or color, admission to and education in any public school operated solely for children of the white race; and requiring the infant plaintiffs, solely because of their race or color, to attend public schools operated exclusively for Negro children.

In identical answers[2] defendants originally filed motions to dismiss the actions on the following grounds:

(a) The School Boards allege that they are agencies of the State of Virginia and the State has not given its consent to be sued;

(b) The Division Superintendents allege that the respective complaints fail to state a claim against them upon which relief can be granted; and

(c) The Court lacks jurisdiction and the proceedings involve no case or controversy upon which relief should be granted.

At a pre-trial conference in the Newport News case held on the 2nd day of July, 1956, the Court took cognizance of the fact that the Governor of Virginia had declared his intention to convene the General Assembly of Virginia in Special Session not later than September 6, 1956, to enact certain legislation dealing with the problems involving public education following the decisions of the United States Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, and *Brown* v. *Board of Education*, 349 U. S. 294, as well as other related *School Segregation Cases*. An order was entered[3] permitting counsel for all parties to file such additional pleadings and such amendments of pleadings as counsel desired; the filing date to be within twenty (20) days

[2] It is unnecessary to set forth the averments, admissions or denials of the answers as the matter is now before the Court on defendants' motions to dismiss.

[3] A similar order was thereafter entered in the Norfolk case.

after the enactment of any public school legislation by the General Assembly of Virginia, regardless of the effective date of such law.

Within the time specified by the Court's order, defendants filed supplemental motions to dismiss which are identical in each case. The basis of the supplemental motions is that the plaintiffs have not exhausted the administrative remedies allegedly afforded them by Chapter 70 of the Acts of Assembly for the Extra Session of 1956. On November 17, 1956, the Court heard extensive arguments[4] in both cases on the motions to dismiss. In short, plaintiffs concede that they have not attempted to exhaust the alleged administrative remedies provided under the aforementioned Chapter 70; nor do they intend to do so as it is their contention that Chapter 70 is unconstitutional *on its face* as contrasted with being unconstitutional in its application. While the Act which is the subject matter of this controversy did not become effective until December 28, 1956, counsel agreed that the argument on November 17, 1956, would be treated as though the Act was effective, and the Court would defer its decision until subsequent to the effective date of the new law.

As to the issues raised in the original motions to dismiss, these matters are concluded by the opinion of the United States Court of Appeals for the Fourth Circuit in the *Charlottesville* and *Arlington* school cases[5] on appeals from District Judges Paul and Bryan respectively. Nothing need be added thereto as counsel concede that this opinion is binding upon this Court.

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[4] Argument of counsel consumed nearly five (5) hours and has been transcribed.

[5] *The School Board of the City of Charlottesville, et al v. Doris Marie Allen, et al* (Record No. 7303), and *County School Board of Arlington County, Virginia, et al.* v. *Clarissa S. Thompson, et al* (Record No. 7310), decided December 31, 1956.

The two remaining questions for this Court's determination are:

(1) Are the new school laws of Virginia, and particularly the aforementioned Chapter 70, unconstitutional on their face?

(2) Is a three-judge court required by law to decide the constitutional question raised by the defendants' supplemental motions to dismiss?

The Constitutionality of the Pupil Placement Act as Provided by Chapter 70, Acts of Assembly, Extra Session of 1956.

It is a well-settled principle of law that legislation enacted carries with it a presumption of constitutionality. There are, however, certain limitations on the application of this rule as stated in *Ex Parte Endo*, 323 U. S. 283, 299, where it is said that the Supreme Court "has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific provision of the Constitution". And in *Korematsu* v. *United States*, 323 U. S. 214, 216, appears this language:

> "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. This is not to say that all such restrictions are unconstitutional. It is to say that cou[illegible] must subject them to the most rigid scrutiny."

Counsel for the respective School Boards concede that this Court is obliged to follow the rulings of the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit. It does not lie within the purview of a District Judge to alter or amend these decisions

irrespective of the wisdom of the same—that remedy rests in the highest court of the nation or in a constitutional amendment.

Equally well-settled is the principle that, in determining the constitutionality of legislation, a court should examine the legislative history of same to ascertain the legislative purpose and intent, and that acts in *pari materia* should be construed together.[6] Statutes having the same general purpose, relating to the same class of subjects, constituting parts of the same general plan, and aimed at the accomplishment of the same results, are all considered together.[7] It is significant that the Supreme Court of Appeals of Virginia has consistently adhered to this doctrine and it is largely immaterial in determining whether the legislation was passed at the same session, or at an earlier date without reference to the statute in *pari materia*.[8] Similarly, reports of legislative committees and pertinent resolutions, while not binding upon the Court, may be examined to ascertain the legislative intent in enacting the laws under attack.[9]

With these uncontroverted principles in mind the Court is duty bound to review the forerunners and objectives leading to the enactment of Chapter 70 (referred to as the Pupil Placement Act) by the Special Session of the General Assembly of Virginia in September, 1956.

Following the first decision of the United States Supreme

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[6] *United States* v. *Stewart*, 311 U. S. 60; *Sanford* v. *Commissioner of Internal Revenue*, 308 U, S. 39; *Joy* v. *Green*, 194 Va. 1003, 76 S. E. (2d) 178; *Soble* v. *Herman*, 175 Va. 489, 9 S. E. (2d) 459.

[7] *Seaboard Finance Corp.* v. *Commonwealth*, 85 Va. 280, 38 S. E. (2d) 770; *Commonwealth* v. *Sanderson*, 170 Va. 33, 195 S. E. 516; *Soble* v. *Herman*, supra; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374.

[8] *Mitchell* v. *Witt*, 98 Va. 459, 36 S. E. 528.

[9] *Wright* v. *Vinton Mountain Trust Bank*, 300 U. S. 440; *McFeeley* v. *Commissioner of Internal Revenue*, 296 U. S. 102; *Boyer-Campbell Co.* v. *Fry*, 271 Mich. 221; 260 N. W. 165, 98 A.L.R. 827.

Court in *Brown* v. *Board of Education*, supra, decided May 17, 1954, the Governor of Virginia, on August 30, 1954, created and appointed a legislative commission, known as the Virginia Commission on Public Education, consisting of thirty-two (32) members of the General Assembly, with instructions to make appropriate recommendations. After a period of slightly more than fourteen (14) months, it submitted its report to the Governor in what is generally referred to as the "Gray Report", named for the Chairman of the Commission. In substance, the Commission expressed its views that separate facilities in public schools were for the best interest of both races and recommended the enactment of a pupil assignment program permitting local school boards to assign pupils in such manner as would best serve the welfare of their communities and protect and foster the public schools in the localities in question. It further recommended that no child be required to attend a school wherein both white and colored children are taught, and suggested tuition grants for parents of children who objected to integrated schools, or who lived in communities wherein no public schools are operated. In further discussing its proposal the "Gray Commission" said:

> "Such legislation would be designed to give localities broad discretion in the assignment of pupils in the public schools.
>
> "Assignments would be based upon the welfare of the particular child as well as the welfare and best interests of all other pupils attending a particular school. The school board should be authorized to take into consideration such factors as availability of facilities, health, aptitude of the child and the availability of transportation.
>
> "Children who have heretofore attended a particular public school would not be reassigned to a different one except for good cause shown. A child who has not

previously attended a public school or whose residence has changed, would be assigned as aforesaid."

As the "Gray Report" was submitted to the Governor on November 11, 1955, the General Assembly of Virginia concluded that insufficient time remained to consider the "Gray Report" in detail at the 1956 Regular Session convening early in January. Certain resolutions were, however, presented and adopted, including Senate Joint Resolution No. 3 generally referred to as the "Interposition Resolution". Without quoting verbatim the resolution under consideration, it is sufficient to state that it urges the adoption of a constitutional amendment "to settle the issue of contested power" between State and Federal Governments. The preamble to the resolution and the final paragraph thereof are, to a limited extent, significant, where it is said in the preamble:

> ". . . Recognizing, as this Assembly does, the prospect of incalculable harm to the public schools of this State and the disruption of the education of her children, Virginia is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens."

And in the final paragraph:

> "And be it finally resolved, that until the question here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers, and to urge upon our sister States, whose authority over their own most cherished powers may next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States."

It was, of course, within the prerogative of the General Assembly to adopt this and any other resolution[10] but the distinguished members of this body (many of whom are able attorneys) must recognize that such proclamations may have some bearing upon the questions of intent in arriving at a determination of the constitutionality of any laws subsequently enacted. The passage of the resolutions to which reference has been made is not, however, determinative of the final issues in these cases now pending.

On August 27, 1956, the Governor of Virginia addressed the General Assembly at its Special Session convened for the purpose of considering educational matters. Included in his remarks are the following comments:

> "The people of Virginia and their elected representatives, are confronted with the gravest problems since 1865. Beginning with the decision of the Supreme Court of the United States on May 17, 1954, there has been a series of events striking at the very fundamentals of constitutional government and creating situations of the utmost concern to all of our people in this Commonwealth, and throughout the South.
>
> "Because of the events I have just mentioned, I come before you today for the purpose of submitting recommendations to continue our system of segregated public schools.
>
> . . .
>
> "We have an excellent system of public schools in Virginia, for both white and Negro pupils. We have invested many millions of dollars in it and have vastly increased appropriations, both state and local, for its

[10] The 1956 Regular Session likewise adopted House Joint Resolution No. 97, referred to as the "Pope Resolution", declaring the public policy of Virginia to be opposed to athletic teams of any public free school engaging in contests within the State of Virginia with other teams on which persons of the white and colored races are members

maintenance and operation. We have done this because we realize the importance of education to all our citizens. We want to preserve this system and the opportunities it offers, without discrimination to members of all races. We are convinced that it can be preserved and operated as an efficient state-wide system only by segregation of the races. We likewise are satisfied that we are within our rights, historically and legally, in taking every honorable and constitutional step to retain control and jurisdiction over this cherished system of public education. Our position was confirmed and encouraged by every decision of the Supreme Court of the United States over a period of nearly sixty years, prior to 1954.

". . . Manifestly, integration of the races would make impossible the operation of an efficient system. By this proposed legislation, the General Assembly, properly exercising its authority under the Constitution, will clearly define what constitutes an efficient system for which State appropriations are made.

"The proposed legislation recognizes the fact that this is the time for a decisive and clear answer to these questions:

"(1) Do we accept the attempt of the Supreme Court of the United States, without constitutional or any other legal basis, to usurp the rights of the States and dictate the administration of our internal affairs? (2) Do we accept integration? (3) Do we want to permit the destruction of our schools by permitting 'a little integration' and witness its subsequent sure and certain insidious spread throughout the Commonwealth? My answer is a positive 'No'. On the other hand, shall we take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers? My answer is a definite 'Yes', and I believe it to be the answer of the vast majority of the white people of Virginia, as well as the answer of a large, if unknown, number of Negro citizens."

Manifestly, the Governor of Virginia has suggested that there shall be "no integration" of races in the public schools of Virginia, irrespective of how slight it may be. The question remains: Has Virginia now enacted a constitutional act which is non-discriminatory in nature, and hence not in violation of the Fourteenth Amendment to the Constitution of the United States as interpreted by the United States Supreme Court in the *School Segregation Cases* which counsel for the defendants, including the able Attorney General of Virginia, admit are binding upon this Court? In compliance with my oath of office and my duty to determine matters from a legalistic viewpoint in accordance with the decisions of the appellate courts, I must answer this question in the negative as it is my firm conviction that Chapter 70, known as the Pupil Placement Plan, is unconstitutional on its face. The legislation is directly in the teeth of the language of the Supreme Court in *Brown*, supra, where it is declared "the fundamental principle that racial discrimination in public education is unconstitutional", and "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle".

Certainly in the Fourth Circuit it is now the law that plaintiffs in this type of action must exhaust their administrative remedies before seeking relief in the federal courts. *Carson* v. *Board of Education*, 4 Cir., 227 F. (2d) 789; *Hood* v. *Board of Trustees*, 4 Cir., 232 F. (2d) 626; *Carson* v. *Warlick, District Judge*, 4 Cir., ... F. (2d) ..... (decided November 14, 1956); *Robinson* v. *Board of Education*, D.C. Md., 143 F. Supp. 481; *The School Board of the City of Charlottesville* v. *Allen*, 4 Cir., ... F. (2d) ..... (decided December 31, 1956). But *Carson* v. *Warlick*, supra, and the *Charlottesville* and *Arlington* school cases point out that the *administrative remedy must be adequate*, and *Carson* refers to *Lane* v. *Wilson*, 307 U. S. 268, where it is sug-

gested that certain so-called administrative remedies nullify "sophisticated as well as simple-minded modes of discrimination". Is the alleged administrative remedy adequate on its face or is it, as the Court concludes, in truth and in fact an "administrative block"? Let us now review the proceedings of the 1956 Extra Session to ascertain whether any adequate administrative remedy appears therein.

The General Assembly amended and reenacted the Appropriations Act, previously approved March 31, 1956, to provide that the sums appropriated in Items 133, 134, 137, 138 and 143 would be solely for the maintenance of an *efficient* system of elementary and secondary schools, and prohibiting the expenditure of any of the funds appropriated by such items in support of any system of public schools which is not *efficient*.[11] It will be noted by reference to the items involved that the key word is "efficient". Following the amendment to Item 143 will be found a statement of policy which

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[11] Italicized words reveal the amendment.

(a) Item 133 appropriates $698,000 for each year of the Biennium "for the establishment and maintenance of local supervision of instruction in *efficient* elementary and *secondary* schools, including visiting teachers, to be apportioned among such schools by the State Board of Education".

(b) Item 134 appropriates $34,342,000 and $37,882,000 for the respective years of the Biennium "for basic appropriation for *salaries of teachers employed only in efficient elementary and secondary schools*".

(c) Item 137 appropriates $7,079,680 and $9,174,625 for the respective years of the Biennium "for salary equalization *of teachers employed only in efficient elementary and secondary schools*".

(d) Item 138 appropriates $6,240,090 and $6,536,400 for the respective years of the Biennium "for providing a minimum educational program in *efficient elemeniary and secondary schools only*".

(e) Item 143 appropriates $4,895,145 and $5,035,145 for the respective years of the Biennium "for pupil transportation *to and from efficient elementary and secondary schools only*".

clearly establishes the intent of the General Assembly of Virginia in these words:

> "The General Assembly declares, finds and establishes as a fact that the mixing of white and colored children in any elementary or secondary public school within any county, city or town of the Commonwealth constitutes a clear and present danger affecting and endangering the health and welfare of the children and citizens residing in such county, city or town, and that no efficient system of elementary and secondary public schools can be maintained in any county, city or town in which white and colored children are taught in any such school located therein.
>
> "An efficient system of elementary public schools means and shall be only that system within each county, city or town in which no elementary school consists of a student body in which white and colored children are taught.
>
> "An efficient system of secondary public schools means and shall be only that system within each county, city or town in which no secondary school consists of a student body in which white and colored children are taught.
>
> "The General Assembly, for the purpose of protecting the health and welfare of the people and in order to preserve and maintain an efficient system of public elementary and secondary schools, hereby declares and establishes it to be the policy of this Commonwealth that no public elementary or secondary schools in which white and colored children are mixed and taught shall be entitled to or shall receive any funds from the State Treasury for their operation, and, to that end, forbids and prohibits the expenditure of any part of the funds appropriated by Items 133, 134, 137, 138 and 143 of this section for the establishment and maintenance of any system of public elementary or secondary schools, which is not efficient.

"The appropriations made by Items 133, 134, 137, 138 and 143 of this section shall be deemed to be appropriated separately to the counties and cities and the funds made available and apportioned to the counties and cities severally and separately by the Department of Education and the State Board of Education shall be separately subject to the limitations imposed in this section for their use, which limitations and a strict observance thereof shall be a condition precedent to their use.

"For the purposes of this section and all other applicable laws, the public schools of the counties, cities and towns shall consist of two separate classes, namely, elementary and secondary schools.

"Notwithstanding any other provisions of this Chapter or the provisions of any other law, whenever the student body in any elementary or secondary public school shall consist of both white and colored children, the Department of Education, the State Board of Education, the State Comptroller, the State Treasurer, local school board, local treasurer, and any officer of the State or of any county or city who has power to distribute or expend any of the funds appropriated by Items 133, 134, 137, 138 and 143, each severally and collectively, are directed and commanded to refrain immediately from paying, allocating, transferring or in any manner making available to any county, city or town in which such school is located any part of the funds appropriated in Items 133, 134, 137, 138 and 143 for the maintenance of any public school of the class of the school in which white and colored children are taught. Whenever it is made to appear to the Governor, and he so certifies to the Department of Education, that all such schools of such class within any such county, city or town can be maintained and operated without white and colored children being mixed or taught therein, the funds appropriated in Items 133, 134, 137, 138 and 143 to such county or city shall be

made available, subject to the limitations contained herein and only for such period of time as it is made to appear to the Governor that there is no school of that class being operated in such county, city or town, in which white and colored children are mixed and taught, provided that all the limitations herein contained shall again be effective immediately whenever it appears that any children are being mixed and taught in any public school of the class involved.

"It is provided that the limitations herein set forth shall not prohibit the release and distribution of the funds apportioned and allocated, or any unexpended part thereof, to which any county, city or town would otherwise be entitled, to such county, city or town for the payment of salaries and wages of unemployed teachers in State aid teaching positions, and other public school employees, who are under contract and for educational purposes which may be expended in furtherance of elementary and secondary education of Virginia students in nonsectarian private schools, as may be provided by law."

Thus it follows, as a matter of law, that whenever the student body of any elementary or secondary school shall consist of both white and colored children, whether placed there by the Pupil Placement Board or pursuant to a court order, the funds appropriated under the five numbered items shall terminate as to *all* schools of the same class in that particular county, city or town. For the first year of the Biennium the aggregate of the funds provided in the five items is $53,254,915 out of a total budget of $60,560,210; for the second year the aggregate is $59,326,170 out of a total budget of $67,076,205. It is argued that the county, city or town so affected would still have available approximately $7,500,000 for each year of the Biennium, but counsel have overlooked the fact that the other items must

be pro-rated between all counties, cities and towns throughout the State. Additionally, there are many of the remaining items payable for state administration or otherwise apportioned under rules and regulations of the State Board of Education with the approval of the Governor. Only such items as vocational education and industrial rehabilitation will not materially suffer. While it is true that there are other funds apportioned and returned to the localities, this would be a mere pittance to what is required to operate the public schools of any community. It follows that the General Assembly has substantially cut off all funds for school appropriation at the state level for any class of schools in the entire locality, in the event any white and colored children are permitted to attend the same school.

With this background the General Assembly proceeded to enact the Pupil Placement Act,[12] the constitutionality of

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[12] The pertinent provisions of Chapter 70 (Pupil Placement Act) are as follows:

"§ 1. All power of enrollment or placement of pupils in and determination of school attendance districts for the public schools in Virginia is hereby vested in a Pupil Placement Board as hereinafter provided for. The local school boards and division superintendents are hereby divested of all authority now or at any future time to determine the school to which any child shall be admitted. The Pupil Placement Board is hereby empowered to adopt rules and regulations for such enrollment of pupils as are not inconsistent with the provisions hereinafter set forth. Such rules and regulations shall not be subject to Chapter 1.1 of Title 9 of the Code of Virginia, the short title of which is 'General Administrative Agencies Act'. The Pupil Placement Board and any of its agents hereinafter provided for shall have authority to administer oaths to those who appear before said Board or any of its agents in connection with the administration of this act.

"§ 2. The Pupil Placement Board may designate, appoint and employ such agents as it may deem desirable and necessary in the administration of this act. It may authorize such agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by said Board.

"§ 2a. For the conduct of such hearings and to facilitate the performance of the duties imposed upon it and its agents under this act,

which is the subject of this memorandum. The practical operation of this Act is unique, to say the least. At the outset it is necessary to consider the language of § 4 which has the effect of "freezing" any child in the school now attended until graduation therefrom "unless enrolled, *for*

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the Pupil Placement Board is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

"§ 3. The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:

(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school.

(2) The health of the child as compared to other children in the school.

(3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.

(4) Availability of facilities.

(5) The aptitude of the child.

(6) Availability of transportation.

(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socio-economic class consciousness among the pupils.

(8) Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

"§ 4. After the effective date of this act, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled, for good cause shown, in a different school by the Pupil Placement Board.

"§ 5. Any child who desires to enter a public school for the first time following the effective date of this act, and any child who is graduated from one school to another within a school division or who transfers to a school division, or any child who desires to enter a public school after the opening of the session, shall apply to the Pupil Placement Board for enrollment in such form as it may prescribe, and shall be enrolled in such school as the Board deems proper under the provisions of this act. Such application shall be made on behalf of the

good cause shown, in a different school by the Pupil Placement Board" consisting of three members appointed by the Governor.[13] The Attorney General, at the time of oral argument, stated that if any child could establish to the satisfaction of the Board that he was being deprived of

[13] The three members of the Pupil Placement Board have, since the date of argument, been appointed by the Governor. They are residents of Danville, Nansemond County and Richmond. There is a serious question as to their authority to delegate their duties in considering routine applications for enrollment or transfer despite the provisions of § 2 and § 2a.

child by his parent, guardian or other person having custody of the child.

"§ 6. Both parents, if living, or the parent or guardian of a pupil in any school in which a child is enrolled by action of the Pupil Placement Board, if aggrieved by an action of the Board, may file with the Board a protest in writing within fifteen days after the placement of such pupil. Upon receipt of such protest the Board shall hold or cause to be held a hearing, within not more than thirty days, to consider the protest and at the hearing shall receive the testimony of witnesses and exhibits filed by such parents, guardians or other persons, and shall hear such other testimony and consider such other exhibits as the Board shall deem proper. The Board shall consider and decide each individual case separately on its merits. The Board shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the city or county wherein the aggrieved party or parties reside. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter and the time and place of the hearing. The Board shall, within not more than thirty days after the hearing, file in writing its decision, enrolling such pupil in the school originally designated or in such other school as it shall deem proper. The written decision of the Board shall set forth the findings upon which the decision is based. Any parent, guardian or other person having custody of any child in the particular school in which a child is enrolled by action of the Board shall be deemed an interested party and shall have the right to intervene in such proceeding in furtherance of his interest.

"§ 6a. Any parties aggrieved by a decision of the Pupil Placement Board under this act, or any party defined as an interested party in § 6 may obtain a review of such decision by filing an application in writing for a review thereof with the Governor within fifteen days after such decision. Such application shall be by a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Pupil

attending any school by reason of race or color, this would be "good cause" in and of itself. Whether this interpretation of §4 would be binding upon the Pupil Placement Board, or any successor Attorney General, is problematical. Plaintiffs answer this argument by stating that, after con-

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Placement Board, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Pupil Placement Board and a transcript of the proceedings before the Pupil Placement Board, which shall be furnished to the petitioner by the Pupil Placement Board within ten days after request therefor upon payments of the costs of such transcript by the petitioner. Upon the filing of a petition for a review with the Governor, the Governor shall set the same for a hearing and within fifteen days after the petition has been filed with him, he shall file, in writing, his decision, enrolling such pupil in the school originally designated or in such other school as he shall deem proper. The written decisions of the Governor shall set forth the findings upon which his decision is based.

"§7. Any party aggrieved by a decision of the Governor under this act or any party defined as an interested party in §6 may obtain a review of such decision by filing in the clerk's office of the circuit court of the county or corporation court of the city in the jurisdiction of which such party resides, within fifteen days after such decision, a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Governor, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Governor and a transcript of the proceedings before the Governor, which shall be furnished to the petitioner by the Governor within ten days after request therefor upon payment of the costs of such transcript by the petitioner.

"§7a. Any interested party, as defined in §6 may, by petition, intervene for the purpose of making known and supporting his interest, in any proceeding for review of the Pupil Placement Board's decision instituted by an aggrieved party or by another interested party; and the court having jurisdiction of such review proceedings shall hear the evidence of as many interested parties, as defined in §6, in any such review proceeding, as in its discretion it may deem proper, whether or not such interested parties shall have petitioned for such review or petitioned to intervene therein.

"§8. Upon the filing of the petition the clerk of the court shall forthwith notify the Pupil Placement Board, requiring it to answer the statements contained in the application within twenty-one days, but failure to do so shall not be taken as an admission of the truth of the

sidering the provisions of § 3 as well as the legislative declarations in the Appropriation Act, the statement of the Attorney General may well be doubted and, in any event, such considerations are calculated to substantially impair the free exercise of any discretion the Board may have in the matter.

As to children attending school for the first time, or children transferring to another school division, or graduating from one class of school to another, such child is required to apply to the Pupil Placement Board and is thereafter enrolled "in such school as the Board deems proper under the provisions of this Act."

It is abundantly clear that the Board, in acting upon the

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facts and allegations set forth therein. The clerk of the court shall publish a notice of the filing of such application once a week for two successive weeks in a newspaper of general circulation in the county or city for which the court sits and shall, in addition, post the same at the door of the courthouse. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter, and shall set forth the time and place for the hearing. The proceedings shall be matured for hearing upon expiration of twenty-one days from the issuance of the notice to the Pupil Placement Board by the clerk of the court and heard and determined by the judge of such court, either in term or vacation.

"§ 9. The findings of fact of the Pupil Placement Board shall be considered final, if supported by substantial evidence on the record.

"§ 10. From the final order of the court an appeal may be taken by the aggrieved party or any interested party, as defined in § 6, to the Supreme Court of Appeals as an appeal of right, in the same manner as appeals of right are taken from the State Corporation Commission.

"§ 10a. An injunction proceeding may be brought in any State court of competent jurisdiction by the Commonwealth, or by any interested party as defined in § 6, for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in evasion of, in disregard of, or at variance with, any of the foregoing provisions.

"§ 11. Neither the Pupil Placement Board nor its agents shall be answerable to a charge of libel, slander or insulting words, whether criminal or civil, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made during the proceedings or deliberations."

application, must apply the standards prescribed under §3 of Chapter 70. That section requires the Board to consider certain factors, among them being:

(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the *efficiency* of the operation of said school;
(2) The health of the child as compared to other children in the school;
(6) Availability of transportation;
(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils;
(8) Such other relevant matters as may be pertinent to the ~~*efficient*~~ operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

The Pupil Placement Act was approved on September 29, 1956, which is the same date on which the Appropriations Act (Chapter 71) was amended and reenacted wherein the General Assembly made its declaration of policy and defined an "efficient" system of public schools. Under such a declared policy and definition the Pupil Placement Board would indeed be derelict in its duty if it ever permitted admission of a Negro child in a school heretofore reserved for white children, and vice versa. Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body.

The Attorney General argues that the Legislature has provided "a plain and simple path for any parent aggrieved, white or colored, to take it (the application) up." With this

statement the Court must respectfully disagree. By §129 of the Constitution of Virginia, the General Assembly is required to establish and maintain an efficient system of public schools throughout the State. That this provision is mandatory cannot be doubted under the decision of *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S. E. 419.[14] The word "efficient" has not heretofore been defined by the Legislature or by the courts of Virginia. Suddenly, for the first time since the adoption of the Constitution of Virginia and significantly enough at a session of the General Assembly convened for the purpose of considering educational matters, the Legislature defines the word "efficient" in the Appropriations Act, and in Chapter 67, so as to exclude any school system wherein both white and colored children are in attendance. When we turn to the Pupil Placement Act and the use of the word "efficient" under §3(1) and §3(8), it would indeed be charitable to assume that the General Assembly had in mind varying interpretations of this word.

Assuming arguendo that a child is not barred under the provisions of §4, and that the word "efficient" as used in §3(8) has no reference to the definition placed thereon by the terms of the Appropriations Act, the cumbersome procedure approved by the Legislature falls far short of meet-

[14] While not here necessary to decide, the *Shockley* case, supra, casts doubt upon the constitutionality of §10 of Chapter 68 (hereinafter discussed), as §136 of the Constitution of Virginia limits the right of each county, city or town to levy taxes on property "not to exceed in the aggregate in any one year a rate of levy to be fixed by law". The problem facing any county, city or town is indeed difficult despite the provisions of Chapter 57, adopted September 29, 1956. Furthermore, in the *Shockley* case, the Court said: "Under the law the school board not only has the authority, but it is its duty, to protect the school revenues by proper legal action, whenever threatened with loss or detriment from any cause." The cut-off provisions of Chapter 71 certainly constitute a threatened loss to the localities considering the status of the taxpayers in that political subdivision.

ing the test of an *adequate* administrative remedy. The procedure for a child already in school, who desires to attend another school, is not specified. Presumably the child would make application for a change under § 5 through his parent, guardian, or other person having custody of the child. After the child has been placed in a particular school by the Pupil Placement Board, both parents, if living, or the parent or guardian of such child, may file a written protest with the Board, within fifteen (15) days after the date of placement. The Board then conducts a hearing within thirty (30) days of the receipt of the written protest, after first giving notice of the hearing by newspaper publication once a week for two successive weeks. Section 6 makes the parent, guardian, etc., of any child in the particular school in which a child is enrolled by action of the Board, an interested party with the right of intervention. Thus, if child "A" desires to attend school "B", having a student body of 2000 pupils, there could be 4000 intervenors in that particular case, each of whom apparently has a legal right to be heard. Thirty (30) days after the hearing (which must be interpreted to mean the termination thereof), the Board files its decision in writing, "enrolling such pupil in the school originally designated or in such other school as it shall deem proper", and the Board is further required to set forth the findings upon which the decision is based. Presumedly these findings would be predicated upon the factors specified in § 3.

Any party aggrieved by the decision of the Pupil Placement Board, including any intervenor parent, etc., may file a written application for a review by the Governor. Such application for review must be filed within fifteen (15) days after the Board's decision. Accompanying the petition for review is required a transcript of the proceedings before the Board, same to be provided within ten (10) days after request and upon payment of costs of such transcript by the

petitioner.[15] The Governor is required to hear the review and file his decision in writing within fifteen (15) days after the petition is filed with him.

Any party, including the parents of children in the schools affected, may, if aggrieved by the action of the Governor, file a petition in an appropriate state court within fifteen (15) days of the Governor's decision.[16] The case is thereafter matured at the expiration of twenty-one (21) days after issuance of notice by the Clerk to the Pupil Placement Board. An appeal of right to the Supreme Court of Appeals of Virginia is provided. It is hardly necessary to discuss any possible court proceedings as the so-called administrative remedy terminates with the decision of the Governor and any person who asserted the violation of the constitutional rights afforded by the Fourteenth Amendment could then seek relief in the federal courts. *Carson* v. *Warlick*, supra. It is, however, important to consider the time consumed by court review as to parents of children (other than the original petitioner) for the reason that no constitutional rights would there be involved. It is also noted that, under the provisions of §9, the findings of fact of the Pupil Placement Board are considered *final*, if supported by substantial evidence on the record.

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[15] The Act also requires, on review of the Governor's decision, the preparation of a transcript of proceedings before the Governor as a condition precedent to a review by the state court. The costs of these transcripts could indeed be burdensome and the ability to supply same within ten (10) days may be impossible by reason of the right granted to all parents to intervene and the volume of testimony to be transcribed.

[16] No provision is made for hearing the review by any party other than the Governor. §2 provides for the appointment of agents by the Board for the purpose of holding hearings and making recommendations. But the Act apparently contemplates a personal hearing by the Governor.

It thus appears that the so-called administrative remedy will consume 105 days until final decision by the Governor. A child seeking relief from the original designation of enrollment at the commencement of a school term in September could not, with any degree of confidence, anticipate a decision through administrative channels until the middle of December. His court action thereafter filed, either in the state or federal court, would not mature until the completion of his grade upon which he is then in attendance. This presents the serious question as to whether this child will not then be required to proceed anew as he will presumedly have been advanced to a higher grade. While the Attorney General conceded in oral argument that such an interpretation would render Chapter 70 nugatory and unconstitutional, it is certainly a debatable point and lends strength to the contention that the Act is unconstitutional on its face. As was said in *Lane* v. *Wilson*, supra, "it hits onerous procedural requirements which effectively handicap" the rights of those seeking the protection of the Fourteenth Amendment.

When the provisions of Chapter 68, approved contemporaneously with Chapter 70, are examined, it is manifest that the language of Chief Judge Parker in *The School Board of the City of Charlottesville* v. *Allen*, supra, is appropriate wherein he said, *"Equity does not require the doing of a vain thing as a condition of relief"*. Under Chapter 68, if the Pupil Placement Board enrolls any Negro child in a school in which white children are already enrolled, or vice versa; or should the Governor, despite his emphatic statement that he will at no time permit "a little integration", act in a similar manner; or should any court enter any order directing the enrollment of a Negro child in any school in which white children are already enrolled or vice versa; it is provided that "such school is closed and is removed from the

public school system". The school remains closed until the Governor, after an investigation, finds and issues an executive order stating "(1) The peace and tranquility of the community in which the school is located will not be disturbed by such school being reopened and operated, and (2) the assignment of pupils to such school could be accomplished without enforced or compulsory integration of the races therein contrary to the wishes of any child enrolled therein, or of his or her parent or parents, lawful guardian or other custodian".[17] Not only is the particular school closed, but defendants concede that all schools of the *same class* within the particular political subdivision will also close by operation of law. For example, if one Negro child is admitted into an elementary school in the City of Norfolk wherein white children are already enrolled, then *all* elementary schools in the City of Norfolk are automatically closed. This is the "adequate administrative remedy" which defendants will have this Court construe to be constitutional on its face.

Defendants urge that § 10 of Chapter 68 furnishes the loophole of protection as to constitutionality. It reads:

> "Notwithstanding any other provision contained in this act, if after investigation the Governor concludes, or, at any time the school board or board of supervisors of the county or the council of the city in which the closed school is located, certifies to the Governor by resolution that in it or their opinion such school cannot be reopened, or reorganized and reopened, in conformity with provisions of this act, the Governor shall so pro-

[17] This provision of § 4 of Chapter 68 carries into effect the legislative act set forth in Chapter 59, approved September 29, 1956, which reads: "Notwithstanding any other provision of law, no child shall be required to enroll in or attend any school wherein both white and colored children are enrolled".

claim, in which event the said school shall again become a part of the public school system of the political subdivision in which it is located, and such school, elementary or secondary, shall along with all other schools of its class in the political subdivision in which it is located thereby become subject to the applicable provisions of the laws of this State."

The so-called "adequate administrative remedy" inevitably leads to the closing of all public schools of the same class in the political subdivision affected. It is true that, subject to its ability to finance the same because of the cut-off provisions of Chapter 71 (the Appropriations Act), a political subdivision may, at its own option, then elect to operate this class of schools with both white and colored children in attendance, but even this provision does not answer Chapter 59 providing that no child shall be required to enroll in or attend any school wherein both white and colored children are enrolled. And defendants further contend that even if the political subdivision operated a certain class of schools under such conditions, the provisions of Chapter 70 relating to the Pupil Placement Board would still be applicable.[18]

There is nothing in *Hood v. Board of Trustees*, supra, and *Carson* v. *Warlick*, supra, to support the defendants' view that the recently enacted laws of Virginia are, by inference, constitutional on their face. The brief *per curiam* opinion in *Hood* does not discuss the constitutionality of the South Carolina statutes, and we are without the benefit of any historical background touching same. It is true that under §21-2 of the Code of Laws of South Carolina this

[18] At the time of oral argument, one of counsel for defendants indicated to the contrary, but later all counsel for defendants stated that Chapter 70 would apply in any event.

state has provided for the cut-off of public funds as to any school from which, and for any school to which, any pupil may transfer pursuant to, or in consequence of, *an order of any court*, for such time that the pupil shall attend a school other than the school to which he was assigned before the issuance of such court order. Neither the Circuit Court of Appeals in *Hood*, nor this Court in the present controversy, is presently faced with the constitutionality of the cut-off provisions as contained in either of the recently enacted South Carolina or Virginia laws. One striking distinction appears to exist on its face in considering the laws of these two states. South Carolina has only provided for the cut-off of funds *in the event of a court order* and has not decreed the actual closing of any school under any circumstances, whereas Virginia took the additional fatal step of providing for the automatic closing of all schools of the same class in the particular political subdivision as well as the cut-off of funds for such schools, *irrespective of whether any child was assigned to another school pursuant to an administrative remedy or court order*. In so doing, Virginia has exhausted the administrative remedy prior to the commencement thereof.

Other recent provisions of the Code of Laws of South Carolina, while not deemed pertinent for the discussion herein, are: §21-46; §21-103; §21-247; §21-247.1; §21-247.2; §21-247.3; §21-247.4; §21-247.5; §21-247.6; §21-247.7; §21-230; and Act No. 712 of the General and Permanent Laws of South Carolina, 1956, approved March 16, 1956. It is sufficient to state that, from a procedural standpoint, the administrative remedy afforded in South Carolina is far *less* complicated, less time-consuming and less expensive, than Virginia has seen fit to accord to its citizens.

In *Carson v. Warlick*, supra, the appellate court has held that the Pupil Placement Act of North Carolina is not un-

constitutional on its face.[19] North Carolina has not provided for either the automatic closing of any school or the cut-off of state or local funds. Obviously the remedies afforded by North Carolina do not lead to a complete "blind alley" such as Virginia has prescribed.

While there are other questions as to the constitutionality of other acts relating to school problems and enacted by the General Assembly of Virginia at its Extra Session 1956, this Court need only deal with Chapter 70, which must be read in light of the related acts, resolutions, and proclamations. It is the opinion of this Court that Chapter 70, as approved September 29, 1956, is unconstitutional on its face and must be disregarded for the further purposes of these cases. The United States Supreme Court has said in the second *Brown* case that good faith implementation of the governing constitutional principles is the proper test for courts to consider. Despite efforts to do so, this Court is unable to discern any evidence of "good faith" in the provisions of Chapter 70 and several of the other legislative acts enacted at the 1956 Extra Session. The pattern is plain—the Legislature has adopted procedures to defeat the *Brown* decision. In doing so it is safe to say that Chapter 70 is invalid on its face.

Nothing herein contained should be construed as automatically granting to plaintiffs the right to enter schools of their choice. The words of District Judge Bryan in the *Arlington* school case, quoted in the affirmance of his action by the Circuit Court of Appeals, are indeed appropriate. A local school board may as in years prior to the *Brown* deci-

[19] All of the recent laws of North Carolina relating to the subject matter may be found in the General Statutes of North Carolina, § 115-176, § 115-177, § 115-178, § 115-179. It should be noted that the Circuit Court of Appeals has not passed upon the constitutionality of certain acts passed at the 1956 Extra Session Laws of the General Assembly of North Carolina, including § 115-166 and the amendments to § 115-176, § 115-177 and § 115-178.

sion, pass upon individual applications for school changes and, so long as discrimination solely by reason of race does not appear, there is no inherent right of any child to attend any particular school in which children of another race are in attendance. But as long as the school boards maintain an announced policy refusing to consider the applications separately and take no steps towards removing the requirement of segregation in the schools which the Supreme Court has held violative of the constitutional rights, there appears to be nothing any court may do other than to enjoin the violation of constitutional rights in the operation of schools by the authorities and, in the event of continued violation, proceed by way of contempt.

The Necessity of a Three-Judge Court

Little need be said as to the necessity of a three-judge court as provided by 28 U.S.C. §2281. Despite the inclination of a District Judge to certify the need for same in matters of a sensitive nature such as these school segregation cases, it is clear that, under the pleadings in these cases, it would be improper to convene same. Plaintiffs do not seek an injunction against the enforcement of any state law. They merely request an injunction directed to defendants of any policy, practice, custom and usage of segregating students in the public schools. In *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, a three-judge court held that no serious constitutional question, not theretofore decided by the Supreme Court of the United States, was presented. The complaint in *Bush* alleged that the Negro children had been denied admission to schools attended by white children, making reference to Louisiana Acts 555 and 556. The three-judge court was then dissolved and District Judge Wright, sitting as a single-judge court, proceeded to ascertain plain-

tiff's rights on an application for temporary injunction. The District Judge concluded that Louisiana Act 556 of 1954, an administrative remedy, was a part of a legislative plan for maintaining segregation in public schools and was, therefore, invalid on its face. With equal force the same principle is applicable in these cases now before the Court.

The history of the statute, 28 U.S.C. § 2281, reveals that only in cases involving the granting of an interlocutory injunction was a three-judge court required prior to 1948. During the latter year Congress added the proviso that a three-judge court is required where there is sought an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of the statute under attack.

The defenses raised on the motions to dismiss under the provisions of Chapter 70 are invoked for the purpose of defeating the jurisdiction of the Court. Similar defenses could be adopted in any routine case and, if a three-judge court be required, the District Judges would generally be sitting on a three-judge court. Such a practice would defeat the purpose of a three-judge court which has been designed for a specific class of cases, sharply defined, and which should not be lightly extended. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Phillips* v. *United States*, 312 U. S. 246; *Smith* v. *Wilson*, 273 U. S. 388.

There is abundant authority to support the view that only a single-judge court is required to determine these motions to dismiss. To convene a three-judge court would be a futile act as it would be necessary to forthwith dissolve the same. The mere fact that the issues involve the delicate question of racial problems affords no reason for ordering

a three-judge court. *Bush* v. *Orleans Parish School Board*, supra; *Davis* v. *County School Board of Prince Edward County*, 142 F. Supp. 616; *Kelley* v. *Board of Education*, 139 F. Supp. 578.

Order accordingly.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
January 11, 1957

ORDER

For reasons stated in a memorandum this day filed, it is

ORDERED that the original and supplemental motions to dismiss as filed by the respective defendants herein be; and the same are, hereby DENIED.

To which action of the Court, the defendants except.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
January 11, 1957

TRANSCRIPT OF PROCEEDINGS IN DISTRICT COURT OF FEBRUARY 12, 1957

THE COURT: Counsel for either the plaintiff or the defendants desire to make any opening statement?

MR. ASHE: No statement for the plaintiff, your Honor.

MR. WILLIAMS: We have no opening statement.

THE COURT: Let's have the first plaintiff witness.

MR. WILLIAMS: May it please the Court, we have three affidavits, which we have given copies to counsel for the plaintiff, we would like to file with their permission, if they don't object to them, subject to their cross-examination.

THE COURT: This same situation came up in Newport News yesterday. Of course, the affidavits may be different. I, of course, have not seen them.

What is your feeling, Mr. Hill and Mr. Ashe? I think both of you were over there yesterday in Newport News.

MR. HILL: I was trying to get through this, Judge, to see what we could do about it. Of course, frankly, my position is that the material in the two I have read—one of them I haven't read yet—is irrelevant. But I was wondering if maybe we could just object to them.

THE COURT: Some of it may well be irrelevant. But, of course, you could register your objection to that portion of it and the Court could rule on the objection as to any part that may be irrelevant. Much of the testimony yesterday the Court felt was irrelevant. At the same time, there may be something here—in other words, if I understand the procedure that Mr. Williams would like to adopt is to submit and file these affidavits, that he has the gentlemen here who made the affidavits, that they are here for the purpose of examination, that he may wish to call one of them for a few additional questions, I believe Mr. Brewbaker, the Division Superintendent of Schools, and of course they would be subjected to any cross-examination on your part.

MR. WILLIAMS: May it please the Court, Mr. Brew-

baker's a. 'avit is the main affidavit. The others are very short. Mr. Brewbaker had prepared the data in that affidavit himself, largely with his own stenographer and in handwriting. We simply put it in affidavit form. What I would like to do would be to file it so it would be a written record, and put him on the stand and let him read his own affidavit, which he made himself; no assistance from counsel as to what he should do or ought not to do. So we could do that with Mr. Brewbaker's affidavit. The other affidavits are very short.

THE COURT: Of course, I would have to rule if there is objection, why, naturally the witness must be produced. On the other hand, it may shorten it.

MR. HILL: As I say, counsel are perfectly willing to cooperate in any way we can to shorten the hearings.

MR. WILLIAMS: For the Court and counsel, it was my intention to let Mr. Brewbaker read his memorandum, which I placed in the form of an affidavit only, because it has a lot of statistical data in it and it would be pretty hard for the Court to understand it or anybody else to understand it, and we would simply file it.

THE COURT: If that is acceptable then and if the procedure is acceptable to counsel for the plaintiff, the Court will, after the plaintiffs have submitted their evidence, permit the filing of the affidavits and then if counsel for the plaintiffs desire to call any of the particular affiants named in those affidavits they may do so and subject them to such cross-examination as they may care to. Also, Mr. Williams, you may recall Mr. Brewbaker if you care to. I think you indicated you wished to put him on.

Let's have the first plaintiff's witness.

Testimony of William B. Westbrook

DIRECT EXAMINATION

By Mr. Ashe:

Q Will you please state your name and address.

A William B. Westbrook, 408 E. Berkley Avenue, Norfolk.

Q What is your occupation?

A Minister.

Q Are you minister of a church?

A I am minister of the New Central Baptist Church.

Q Are you a resident of the city of Norfolk, State of Virginia, and the United States of America?

A I am.

Q What racial identity are you?

A Negro.

Q Do you have a child?

A I have two.

Q What ages are your children?

A Eight and eleven.

Q Do your children attend the public schools of the City of Norfolk?

A They do.

Q Were they attending the public schools of the City of Norfolk during the years 1955-1956?

A They were.

Q They are now in school?

A They are.

Q What are the names of your children?

A William B. Westbrook, Jr., and Harriet Lula Frances Westbrook.

Q Are you one of the petitioners in this suit?

A I am.

Q And it is against the School Board of the City of Norfolk?

A Yes.

Q What school do your children attend?

A Abraham Lincoln School.

Q Where is it located?

A In the Berkley section of Norfolk.

Q Are there any white children attending the school your children attend?

A No, they are not.

Q Is that a purely segregated school your children attend?

A It is.

Q Did you make any request of the School Board of the City of Norfolk to desegregate the school that your children attend?

A Well, there was an application made some months ago asking for relief in this particular respect.

Q Did you receive any answer from the School Board?

A No answer.

Q And the Abraham Lincoln School is still a segregated school?

A It is.

Q Are you and your children citizens of the United States?

A We are.

Q How long have you been a resident of the City of Norfolk?

A Nine years.

Q And your children have been with you all during that time?

A Yes, they have.

MR. ASHE: Your witness.

MR. WILLIAMS: No questions.

Testimony of Mrs. Elizabeth T. Branch

DIRECT EXAMINATION

BY MR. ASHE:

Q What is your name and address?

A Mrs. Elizabeth T. Branch.

Q Where do you live?

A 904 Johnstons Road.

Q That is in the city of Norfolk, Virginia?

A It is.

Q What is your occupation?

A I am a clerk.

Q Are you a citizen of the United States?

A I am.

Q Do you have any children?

A Yes.

Q Are they citizens of the United States?

A They are.

Q What is the name of your child?

A Carole Lenette Branch, Brenda Maria Branch, and Anita Evonne Branch.

Q What are the ages of your children?

A Twelve, eleven, and six.

Q Do they attend the public schools of the city of Norfolk?

A They do.

Q What schools do they attend?

A Jacox Junior High School, Oakwood Elementary, and Liberty Park.

Q What section of the city is Johnston Road?

A Chesapeake Manor Gardens.

Q What section of the city is Jacox School?

A It's in the over town section.

Q What street?

A It's Marshall Avenue.

Q How far is the Jacox School from your home?

A Well, it's approximately seven miles.

Q Are there any white children attending the Jacox School?

A No.

Q Is Jacox School a segregated school?

A It is.

Q Is that by law in the City of Norfolk?

A It is.

Q Is the attendance of the school that your children attend determined by the race of the child?

A It is.

Q Are there any other schools in the section where you live that your child might attend?

A Yes, there is.

Q Is there any reason why your child is not attending that school?

A Yes, it's a segregated school and she is a Negro.

Q The school that is nearest your home you say is a segregated school?

A It is.

Q Is that white or colored?

A It's white.

Q What is the name of the school?

A Norview Junior High School.

Q Any of your children in elementary school?

A I have two in elementary school.

Q How many children do you have in elementary school?

A Two.

Q Are you one of the petitioners against the School Board of the City of Norfolk?

A I am.

Q You are one of the complainants in this suit against the City of Norfolk?

A I am.

MR. ASHE: Your witness.

MR. WILLIAMS: No questions.

Testimony of Mrs. Fannie Cheatham

DIRECT EXAMINATION

BY MR. ASHE:

Q What is your name?

A Mrs. Fannie Cheatham.

Q Where do you live?

A 714 South Hampton Avenue.

Q That is in the city of Norfolk, Virginia?

A Yes.

Q Of what country are you a citizen of?

A United States.

Q And you are a resident of the city of Norfolk, State of Virginia?

A That is right.

Q Do you have any children?

A Three.

Q And what are their names and ages?

A Solomon Cheatham, age nine; Ronald Cheatham, age eight; and Sarah H. Cheatham, age five.

Q What school—

A Lott Carey.

Q What school do your children attend?

A Lott Carey.

Q What section of the city of Norfolk is the Lott Carey School?

A That is in town near Church Street.

Q Near Church Street?

A Yes.

Q Is the Lott Carey School located on Princess Anne Road in the city of Norfolk?

A That is right.

Q Your children attend that school?

A Two.

Q Two attend the school?

A Yes.

Q Do you have a school in the section in which you live?

A Yes, I do.

Q What section do you live in the city of Norfolk?

A Atlantic City.

Q In Atlantic City?

A Yes.

Q What is the name of the school in the section in which you live?

A Patrick Henry.

Q How far is the Patrick Henry School from your home?

A About a block and a half.

Q Can your children attend the Patrick Henry School?

A No.

Q Is there any reason why they cannot attend?

A Because it's for white only.

Q Is the determination of who attends that school based on race?

A Yes.

BY THE COURT:

Q Where do those children now go to school?

A Lott Carey on Colley Avenue.

Q Colley Avenue and what?

A. Pembroke. Colley and Pembroke.

BY MR. ASHE:

Q I think his Honor asked where your children go to school now.

A They are at Lott Carey on Princess Anne Road.

THE COURT: Princess Anne and what?

THE WITNESS: Smith.

MR. ASHE: Your witness.

MR. WILLIAMS: No questions.

May it please the Court, we are perfectly willing to admit the City of Norfolk is operating segregated schools.

THE COURT: Maybe we can accomplish not only that but perhaps go further. I don't ask that you admit this, but this was done in yesterday's session at Newport News and perhaps the same concessions would be made. Would you be willing to admit, Mr. Williams, that all of the plaintiffs who are parties to this action are citizens of the United States and the State of Virginia?

MR. WILLIAMS: We would.

THE COURT: And that they have the children named in the complaint or referred to in the complaint and that those children are now in attendance at public schools in the city of Norfolk under a segregated school system?

MR. WILLIAMS: We will admit all that.

MR. ASHE: If your Honor please, and that they were petitioners to the School Board of the City of Norfolk requesting that they be given relief to the school nearest their home rather than attend segregated schools.

THE COURT: Were there separate petitions filed with each of these plaintiffs?

MR. ASHE: Collective petition.

THE COURT: Don't you have that petition that we could introduce?

MR. WILLIAMS: Could put that in evidence.

THE COURT: With that concession, then is there any need to call all these witnesses? Let it be so stipulated.

MR. ASHE: Call the Clerk of the School Board of the City of Norfolk.

Testimony of Walter W. Brewster

DIRECT EXAMINATION

BY MR. ASHE:

Q State your name, please.

A Walter W. Brewster.

Q And where do you live?

A 2504 Farley Circle, Princess Anne County, Virginia.

Q What is your occupation?

A Administrative assistant to the Superintendent of Norfolk City Schools and clerk of the School Board.

Q Mr. Brewster, were you the clerk of the School Board of the City of Norfolk at the time the petition was filed with the School Board?

A I was.

Q Were you the clerk at the time that this petition was answered?

A I was.

Q Do you have the minutes pertaining to that meeting that the School Board considered the petition, if they did?

A I do.

Q July 1955. What day was that petition filed, Mr. Brewster?

A July 14, 1955.

Q Do you have the petition there, Mr. Brewster?

A It was not requested. I have a copy of it in the minutes.

Q Was that made a part of the records at that time?

A It was.

Q Do you have the action of the board on that petition?

A I do.

Q Will you read the petition and action of the board.

A (Reading) "Mr. Brewster read the following petition from the NAACP addressed to the School Board of the City of Norfolk, Virginia, and Mr. J. J. Brewbaker, Division Superintendent of City of Norfolk Schools."

Q Mr. Brewster, may I stop you there just a moment, please. Did you see the petition?

A I did.

Q Was that petition from NAACP?

A Shall I read you the first statement in the petition? Perhaps that will answer your question. From memory I can't recall.

Q Go ahead and read.

A "We, the persons whose signatures are attached hereto, are parents or guardians of children of school age eligible to attend public elementary or secondary schools under your jurisdiction. On May 17, 1954, the Supreme Court of the United States ruled that racial segregation in public schools is a violation of the Constitution of the United States. The Supreme Court reaffirmed that principle on May 31, 1955, and directed good faith compliance at the earliest practicable date.

"You have the responsibility of reorganizing the school system under your jurisdiction so that children of school age attending and entitled to attend public schools will not be denied admission to any school or be assigned to a particular school solely because of race or color. We, therefore, call upon you to take immediate steps to reorganize the public schools under your jurisdiction so that children may attend them without regard to their race or color.

"The May 31 decision of the Supreme Court to us means that the time for delay, evasion or procrastination is past. Whatever the difficulties in according our children their constitutional rights, it is clear that the School Board must meet and seek a solution to that question in accordance with the law of the land. As we interpret the decision, you are duty bound to take immediate concrete steps leading to early elimination of segregation in the public schools. Please rest assured of our willingness to serve in any way we can to aid you in dealing with this question.

"We further request that all communications pertaining to this petition be sent to our counsel, Mr. Victor J. Ashe, whose address is 1134 Church Street, Norfolk, Virginia."

Q You have the answer?

A That petition was signed by 233 persons.

Q And was that signed by anybody who was designated as the NAACP?

A I'd have to look at the original.

Q Is that not the actual transcript of that particular petition excepting the names, sir?

A Yes.

Q Then you do not have any record of NAACP in that petition?

A No.

Q Will you read the answer of the School Board to that petition?

A "Move that we acknowledge the receipt of this petition and reply that we intend to operate the Norfolk City schools for the 1955-56 session in accordance with the policy of the State Board of Education.

"It was further moved that we send a copy of the statement of the Norfolk City School Board upon the Supreme Court's decision and a copy of the statement of the Governor and the State Board of Education with the letter and call attention to paragraph 6 of the statement of the Norfolk City School Board."

Q Has the School Board itself done anything towards compliance with the Supreme Court's decision?

A I might read you the statement of the School Board concerning the decision of the Supreme Court.

Q Since this petition has been filed do you have any records of anything that has been done by the School Board of the City of Norfolk to desegregate the schools of the City of Norfolk?

A The School Board has adopted no resolution to date to desegregate the schools.

MR. ASHE: That is all.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. Brewster, will you turn to your minutes of May 12, 1956, and see if the School Board passed a resolution on that date?

A Yes, sir.

Q I hand you what purports to be a copy of that resolution which has been signed by you. Would you examine that and see if that resolution was adopted by the School Board on that day.

A It was.

MR. WILLIAMS: We offer that in evidence.

(Received in evidence and marked Defendant's Exhibit No. 1.)

Q Would you kindly read it so the Court can hear it.

A "A resolution requesting the Honorable Thomas B. Stanley, Governor of Virginia, to call, forthwith, a special session of the General Assembly of Virginia.

"Whereas the School Board of the City of Norfolk and its Superintendent of Schools are defendants in a certain suit instituted in the District Court of the United States for the Eastern District of Virginia, Norfolk Division, whereby the racial integration of the Norfolk public schools is sought; and

"Whereas this School Board is a part of the school system of Virginia and requires the advice, guidance and instruction of the duly constituted authorities of the Commonwealth of Virginia, as it is unable to act without such advice, guidance and instruction; and

"Whereas this Board deems it of the utmost importance

to continue the operation of its schools but desires to conform to the policies, rules and regulations of the Department of Education of the Commonwealth of Virginia; and

"Whereas this Board is not advised of the establishment of any policy or the promulgation of any rules and regulations by the Commonwealth of Virginia in this regard governing the school year beginning September, 1956;

"Now, therefore, be it resolved by the School Board of the City of Norfolk that The Honorable Thomas B. Stanley, Governor of Virginia, be, and he is hereby, requested to call, forthwith, a Special Session of the General Assembly of Virginia in order that a policy may be established by the duly elected representatives of the people of this Commonwealth for the advice, guidance and instruction of this School Board and for the protection of the Public School System by all proper and lawful means.

"Resolved further, that a copy of this resolution be sent by the Clerk of this Board to Thomas B. Stanley, Governor of the Commonwealth of Virginia, and the Council of the City of Norfolk."

MR. WILLIAMS: We offer that as Defendant's Exhibit No. 1.

THE COURT: Let it be so marked.

MR. WILLIAMS: Your Honor, at this time we would like to introduce in evidence a certified copy of an ordinance passed by the City Council on the same effect.

THE COURT: Let it be marked Defendant's Exhibit No. 2. I assume there will be no objection to it. The same thing, the Council join in the request to call the extra session?

MR. WILLIAMS: That is right.

(Received in evidence and marked Defendant's Exhibit No. 2.)

MR. WILLIAMS: That is all the questions I have.

MR. ASHE: No other questions, your Honor. The plaintiff rests, your Honor.

THE COURT: Mr. Williams, you care to file those affidavits? The plaintiff has rested.

MR. WILLIAMS: We would like now to file affidavit of Mr. Brewbaker, School Superintendent, as Exhibit No. 3; and affidavit of Calvin H. Dalby, Director of Public Safety, as Exhibit No. 4; and affidavit of Lieutenant R. P. Racine as Exhibit No. 5. We have furnished counsel with copies.

(Received in evidence and marked Defendant's Exhibits Nos. 3, 4, and 5.)

Testimony of John J. Brewbaker

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr. Brewbaker, have you prepared, yourself, a statement which was put in the form of an affidavit which has been now filed with the Court?

A I have, Mr. Williams.

Q Mr. Brewbaker, in regard to the schools, tell the Court just briefly how long you have been with the schools?

A I have been with the Norfolk public schools for thirty years.

Q And how long have you been Superintendent?

A This is my eighth year as Superintendent.

Q In regard to the physical and educational and teaching facilities, how would you say the schools of the colored people compare with the schools of the white people?

A The facilities and services and other opportunities in the programs of our schools I would say are practically the same. In fact, I would also add that in the last few years the salaries of the Negro teachers have been a little higher than the white teachers and the cost per pupil in the Negro schools has been a little higher.

Q Now as to the physical, will you take up the physical and tell us about those.

A The physical facilities?

Q Yes.

THE WITNESS: You don't mind my referring to my notes, your Honor?

THE COURT: No. You can refer to your notes or anything you have, Mr. Brewbaker. That is perfectly all right.

A The buildings, the number of buildings in the secondary schools, has increased from three in 1936-37 for white children to six in 1955-56; for Negro children from one to three. In the elementary schools the buildings have increased for white from 22 in 1936-37 to 28 in 1955-56; and from 12 for the Negro children in 1936-37 to 17 in 1955-56. I would say the value of the buildings—I won't go through all of this—the value of the Negro elementary schools has increased from $441,102. to $7,324,368 over the twenty-year period. In the elementary school the value of the buildings for white children has increased from $1,991,376 in 1936-37 to $17,063,136 in 1955-56. The high school, the overall increase of school buildings has been from $3,513,346 in 1936-37 for white children to $29,624,412 in 1955-56; and for the Negro children the increase has been over the twenty-year period, $775,630 to $12,300,400. I would like to add this: that during the overall valuation of Negro children during this twenty-year period has in-

creased by 16 times—the value of the Negro buildings increased 16 times and the value of the white buildings has increased by 8 times.

Q As to the efficiency of the teaching staff or teachers for the white and the colored schools —

BY THE COURT:

Q Before you leave that point, because while I don't think it is particularly material, you have selected the years 1936 and '37. Isn't the terrific increase in the value of what you have designated to be Negro schools largely made up by reason of the efforts of the City of Norfolk to comply with what was at one time the law, that is, the separate but equal doctrine?

A Yes, I think so, your Honor. I think that is quite true, your Honor. The increase back twenty years ago, it wouldn't be quite as great if we would take a ten-year period. But during that period of twenty years we have made every effort to provide equal facilities and I think we have succeeded in doing that.

BY MR. WILLIAMS:

Q Now as to the teachers, are they as efficient in the white as they are in the colored or as efficient in the colored as they are in the white?

A Mr. Williams, it's a little bit difficult to rate the efficiency of teachers. I can go by, of course, you have good teachers in both, among the white and Negro. I would say this: that for the past few years we have been able—we have paid on the average a higher salary to Negro teachers than white because we have Negro teachers of somewhat higher training and longer experience; the turn-over isn't as great. So I would say that there shouldn't be too much difference in their efficiency since the training and experi-

ence of the Negro teachers is somewhat above that of the white teachers.

Q How about the classes or the subjects in the schools offered to the colored and to the white?

A We offer the same program to both white and Negro in elementary schools. In the high schools it's practically the same. I can think of two courses that we offer in the Negro schools—I have it in my affidavit. We offer brick-laying, and of course we pay—we don't offer that in the schools. We pay the Virginia State College to give a course in brick-laying for our high school students.

Q Colored school?

A That is a colored school. Then we have a course in the Negro schools of plumbing. Now the only course that we have—and I might say now, right at this period, you know certain types of teachers are difficult to get. Right now we have one vacancy in the Negro schools. We have been unable this year to get a teacher for distributive education in Negro schools and we have been unable to get three teachers in industrial arts in the white schools, so it's a question of unavailability of teachers when those classes are not offered. I would say that our courses in the two schools, Negro High School and the white high schools are practically the same except we offer about one more course in the Negro schools. The vocational office training course, we have not started that in the Negro schools. We have two courses in the Negro schools and one course in the white schools. In other words, there is one more offered in the Negro schools than in the white schools and we are ready to offer the other one if the need and the demand exists for it.

Q Mr. Brewbaker, have you any opinion as to the

desirability, considering both the white and the colored, to integrating the schools at the present time, as to whether it is desirable?

A Mr. Williams, I have this feeling about that: In my review of literature (and I have reviewed quite a bit of literature on this subject) I find that those cities which have been most successful—and I can name some of them, Baltimore, Louisville—those cities had a preparatory period in which there was much work done on the adult level. They worked from ten to fifteen years on the adult level, creating a climate and wholesome working relationships, before they attempted to integrate the children in the schools. Now, Norfolk has started that. We have been doing that; in our administrative conferences we have had mixed groups. This is the eighth year. In our teachers workshop, we started out with separate groups. And —

Q You mean separate white and colored?

A Separate white and Negro. And the last two years we integrated the teachers' workshop. That is a workshop in which all the teachers voluntarily take courses for credit, University credit. I feel this way: that it would be to our great advantage if we could wait until we have worked with the adult groups some time yet before we attempt to integrate the children. Because after all, having lived in Norfolk thirty years, and I think I know the population of Norfolk pretty well, we have some of the best people anywhere to be found among both the white and Negro race in Norfolk. I know them because I work with them. And I believe that by working with the groups together more, we can create attitudes and working relationships that would be of invaluable assistance when we did attempt to desegregate our schools. I feel like if this could be postponed, that we have been working, your Honor, we have done a lot of

work. In fact, I would like to go into all the details of what we have done preparatory and I feel that much more should be done because we haven't worked as long as these cities I related and other cities that I have studied.

BY THE COURT:

Q What can you do in view of the existing State laws?

A I feel like, your Honor, that we have done everything we can under existing State laws. Now, there isn't any State law that prohibits our working on the adult level. We have done a lot of that. We have done that and I think that is pretty important.

Q Of course, this case doesn't involve the adult level. This involves the rights of children to get into schools.

A The reason I am bringing that up is I think we need a climate in which we can desegregate because I think the attitude of the adults is pretty important.

Q Do you think that the State Legislature, what they did at the extra session solved all your problems then and helped you all a lot towards compliance?

MR. WILLIAMS: You are asking the witness a question of law.

A I think it did the opposite, your Honor.

Q I agree with you.

A That is another argument I would have of some delay. I believe probably if we delay this the General Assembly will attempt to work out a more workable plan. We need a more workable plan.

Q Suppose the General Assembly doesn't? Is there any indication that the General Assembly is going to change their attitude? I haven't heard any proclamation from any

of our distinguished leaders that would indicate that they are going to completely reverse themselves, have you?

A I haven't heard anything. I might give you another roadblock that we have right now. The other road block is this: If we were ordered to desegregate at this time, in our ten million dollar budget we have got 23 per cent from the State. Of course, according to the laws as I understand it, our schools would be closed, that class of schools in which we had to desegregate. That would deprive us, to be more exact, $2,360,000. And I have listed in this affidavit the things that I believe would have to be eliminated. One thing we would have to eliminate: We would have to eliminate at least 25 per cent of our teachers. Eighty-eight per cent of our budget is for personal services. When you start eliminating the budget you can't cut $2,300,000 out of our budget without going into personal services. We have to eliminate those things that deal with juvenile delinquency, night schools, supervision, doctors and nurses, all of those things that have made Norfolk one of the best school systems in that group of cities over 200,000 which I meet with twice a year, and I know that we are one of the best school systems in that group. It would drop us from our standing there to one of the very poorest if we could operate at all.

Q There is plenty of time between now and next September for the Legislature with their able members to get together and change those laws, isn't there?

A Your Honor, I don't know how fast they can work.

Q I guess it is the same and is in every case you run into.

A I wouldn't like to predict.

Mr. Williams, there is another point that I would like to make, a reason I think to give us a little more time, is this:

In studying the affidavit you will find that the achievement level of the Negro pupil is somewhat below that of the white. I would have to say that the two factors that contribute most to that in my opinion, one would be the cultural factor. Of course, when you speak of culture it's going to take a long time. We don't expect to create cultural conditions overnight. The other factor is economic and home conditions. I feel like the home conditions of children have much to do with their ability to learn. In Norfolk we have had one of the most magnificent slum clearance and redevelopment programs anywhere in the country. And I feel that I can see a difference now. These children who are taken out of the slums and put in these fine new homes, as they come to the schools, it seems to me that already we see some change and I think the full effect of that change on these children would make them much better able to adjust in a new situation. Those children, when you put a child of lower academic achievement with children with much higher academic achievement, they are going to find it pretty difficult and the more preparation we can make to make this transition easy, I think the more successful our effort will be make the transition or the change in our school system.

BY MR. WILLIAMS:

Q Mr. Brewbaker, I take it that you are vitally interested in both the colored and the white children, are you not?

A I am, Mr. Williams.

Q And you have been with the School Board for a great many years. I am going to do something that I hardly ever do. If there is anything else you want to tell the Court, I would like for you to do it.

THE COURT: I'd like to ask Mr. Brewbaker a question.

BY THE COURT:

Q Of course, there has been no map or plat introduced showing the city of Norfolk but by reason of my residence in this good community I generally understand some of the prevailing situations that would arise by reason of desegregation. Mr. Brewbaker, check with me. I will refer to what I would call difficult localities. One was referred to by one of the plaintiffs; Atlantic City. The area known as Atlantic City, that would present a difficult locality?

A That is right. Atlantic City, the slum clearance and redevelopment, it's most difficult to pass judgment on Atlantic City. But last year, it seemed to me that we had about fifty Negro children who would probably be eligible, living in that district, to go in that school. We have some in the high schools but I am thinking of the elementary. But they have shifted in there so fast, I am not quite sure now the exact number. But that would be, your Honor, one of the schools that would receive the greatest number. It would probably be the school that would receive the greatest number of Negro children.

Q If we took into consideration only geographical allocations for the present?

A That is right.

Q And I am mindful of the fact that the school boards have considerable discretion in handling requests for admission aside from the geographical allocation. They had that long before Brown against the Board of Education?

A We did have.

Q You had it before the State Legislature came in?

A Yes, sir.

Q But I am not presently concerned with that. There is an issue, whether I am correct or not correct as to the Pupil Placement Act, and I am finished with that presently. But let's assume that we took only into consideration the geographical allocations. You estimated, and I realize it is a rough estimate only, that there would be approximately fifty children of the elementary school class that would go to Patrick Henry?

A That is right.

Q And approximately how many white children are over there? Roughly?

A Slightly fewer than 200.

Q In other words, you would have about a four to one basis over there of white and colored?

A That is right.

Q If you handled it purely on the question of geographical assignment?

A That is right.

Q And if you had the legal right to so assign them?

A That is right.

Q The Lambert's Point area, would that present any particular problem? I know you have a colored school out there, elementary school, and you have a white.

A Yes. We have about seven elementary schools right now where there would be some Negro children living eligible according to the districts to attend those schools. Now, James Madison out at Lambert's Point, that would be you might say kind of an exchange proposition because we would have white children living in the Negro area and Negro children living in the white area. But the James Madison School,

I would say—I did have—Would you mind, I have a note on that, you mind glancing at my figures?

Q Yes, indeed.

A This was made up a year ago, of course. I have the Madison School having 32 children above the age of seven last year, and 25 below the age of seven. That means they are high school and elementary. I would say it would be probably 25 or 30 children in the elementary division, that would probably be eligible to go to the James Madison school.

Q Twenty-five or thirty colored children?

A Yes.

Q How many white children would be in that school?

A In the Smallwood—Now, of course, the Negro school is the Smallwood School.

Q I am talking about Madison.

A How many white children? There's around 900.

Q That would be probably better than twenty to one? That would be a proportion of better than twenty to one?

A As I said, at that time we had seven elementary schools that seemed to me in which districts we would have some Negro children living. But the movement of the population takes place so fast, there may be others at this time.

Q And there will be others for years in the future, too?

A That is right. And in the high schools, I think there would be some in all the white high schools.

Q Yes, I recognize that. Do you have any peculiar problem affecting what I would call the Titus Town area off Sewalls Point Road? There is a Negro school in that locality, elementary school?

A That is right. That district, your Honor, is pretty well marked off and Negro pupils pretty well marked off. You see, Meadowbrook is on one side and Granby Elementary on the other. This Titustown School is between the two. I think practically all of those children are living within the present Titustown district. We didn't list that as probably one that—

Q You come down to Bowling Park, which is right across from Granby High School and which the good white people of the city of Norfolk didn't want taken away one time for school purposes because it would disrupt getting their maids and things like that; that presents a very definite problem, doesn't it?

A Yes, your Honor, it does. You know Suburban Park is the nearest white school there. It's right up the same street from it; on the same side of Granby Street. We would have about 25; I would say we would have 25 or 30 elementary school children to go to Suburban Park. Then we would have about a half a dozen to go to North Side.

Q Dealing first with the elementary school system, Suburban Park, you would have 25 to 30 would go in there. How many white children in there?

A About between 650 and 700; about 650, I would say.

Q You would probably have to take the lower figure because when you put the 25 or 30 colored children in there, that raises your number that you can take care of.

A That is right.

Q But, in other words, you have there almost twenty to one differential, is that correct?

A I think it would be.

Q Dealing still with the elementary schools alone, what other particular problem would you have?

A Gatewood and Berkley. We have Berkley, it's a changing school changing population in Berkley. Last year when we—of course, we took the school census and our school enrollment report tried to arrive at some figures. We take the school census every five years. We had last year 69 Negro children living in the Gatewood area above the age of seven and 52 below. I would say there again, Gatewood, some of those are high school. We would have about 50 or 60 Negro children living in the Gatewood area.

Q That would ordinarily be assigned to Gatewood Elementary?

A That is right. But that school is pretty low in population. I think we have fewer than 400 now of white children.

Q There you would have—

A Eight to one.

Q Less than eight to one. Probably seven to one or something like that. I must confess my ignorance as to the annexed territory. I don't know too much about that. What are your problems, if any, out there?

A We have only one Negro elementary school out there, Oakwood. We would have out there probably 200 children, 225 children of junior high school age who would go—

Q Let's deal with elementary first.

A One elementary school, Norview Elementary School. We would have 25 or 30, I would say. Well, that population increases pretty fast. Maybe 35, in the Norview Elementary.

Q And there would be 25 to 30 colored children that ordinarily would go there if assigned by geographical assignment only?

A I think so. You understand, of course, these figures—

Q They are very rough and I realize that you are just giving estimates. But no one, I don't believe, has the exact figures and I would like to get a rough idea of what the picture is. What is the total enrollment at Norview?

A It has eighteen class rooms. I believe it has about 550.

Q So you have there probably twelve to one or thereabouts percentage. Does that substantially cover the problems that would confront the School Board if it had the authority to assign and if they assigned only by geographical allocation?

A No, Monroe School would have one or two or three. A few families moved in Park Place. We had one in September but I think some more families have moved in Park Place.

Q That would be from the standpoint of a problem. The only problem presented there would be the fact that there is always objection plus the fact that, of course, the State law now provides that no one can be required to go to an integrated school.

A And Taylor would have maybe one or two or three out there next to the railroad. Several families out there.

Q What is the particular problem as to the junior high schools? You operate here in Norfolk, if I understand correctly—

A Six-three-three, your Honor.

Q Six-three-three?

A As far as possible. We are so crowded that sometimes we have the ninth grade in senior high school. You see, that would be six grades in elementary, seven, eight, nine in junior high. But sometimes the senior high we

have to shove up the ninth and sometimes the eighth. Sometimes the junior highs are so crowded we have to hold the seventh in the elementary. But our plan is—and we are working pretty fast toward that because right now we are building junior highs. Our plan is six-three-three and we are coming closer to that all the time.

Q I realize there are variations and there was one variation in Newport News yesterday that we had presented. But assuming the plan is on a six-three-three, that is, six grades in the elementary, three in the junior high and three in the senior high, then what is your problem with the junior high schools?

A The greatest number of children of junior high school age would be eligible to go to Norview Junior High. We don't have Negro junior or senior high in that annex area. I would estimate that Norview there would be 200 to 225 pupils in the seventh, eighth, and ninth grades who are now attending Ruffner and Booker T. who would be eligible for the Norview Junior High. We have in that school now about 1600 pupils, which is capacity for it.

Q Your ultimate answer on that is going to be whether you desegregate or you remain segregated you are going to have to build an addition there anyway?

A We are building a couple of junior high schools and we plan to build another elementary school for the Negroes in the Tanners Creek area, but we are building right now two junior high schools, one in Lakewood and one out in Tanners Creek, out in the Lansdale area. We are planning on it. I hope we will get the money to build it.

Q If you have roughly sixteen hundred to eighteen hundred at Norview Junior High School, you couldn't possibly take care of any more in there anyway?

A It's on part time. We have a section of elementary children in that school too. Some of our schools are very, very crowded. That is another situation that I think we would have to be mindful of.

Q Would you have any great problem with any of the other junior highs?

A There would be some scattered children—it's difficult. Now, take Granby, take North Side and Granby, they would get some scattered children there from Bowling Park and Titustown. Take Blair and Maury, you would get some from Atlantic City, Patrick Henry, Lott, Lamberts Point. The Norview Senior High would get the senior high of these I am talking about, I expect they would get 75; junior high, 200. I believe that is all of them. We would have some scattered children but the Norview schools I think would have the largest number because there is no Negro high school in that area.

Q Would you say in either of the junior or senior high schools that you could from a geographical standpoint estimate the percentage to be any less than twenty to one?

A I don't think so, your Honor. The biggest trouble right now with our high schools, they are so crowded. Our junior highs are crowded to death. I don't know what we are going to do next September. Until we get these two new junior high schools completed, I really don't know what we are going to do with those children next September.

Q Of course, it is a very unfortunate situation that all of this litigation and everything arises during an age when the ever increasing population is bringing about a very critical school problem on all levels, elementary, junior high, senior high, college and so forth, isn't that true?

A That is true.

By Mr. Williams:

Q Mr. Brewbaker, I simply want to ask you, I think, one more question. Regardless of legislation or of finance, do you think that working at the adult level will be beneficial and enable you to handle the schools better in the future?

A Mr. Williams, I think it would be most helpful and most beneficial in every way, if we could work at the adult level, because I think it is needed much.

Q And with the crowded conditions that you have just described in the schools, if your funds are withdrawn, how are you going to operate those schools?

A It would be a pretty dark picture. We would have a terrific time. If we operated them it would be on a very low level. Sometimes I wonder whether we could operate them or not with that much money taken out of our budget.

By the Court:

Q How can you work at the adult level? What do you mean by that?

A Here is what we are doing, your Honor. I believe I described the administrative—

Q I can understand the teacher's standpoint.

A And the teacher's workshop. We have an educational television program committee. That committee is made up of both white and Negro lay people and professional people. We have a highway safety committee made up of both school people, lay people, adults, and school people adults. We have had from time to time special committees. We had a bi-racial citizens committee for some time helping to select sites and recommend improvements in our schools. And we could do more of that. I think that, and we ought to do more of it. But right now, for the last year I might say, there has been some tension. It's no use for us to try

to get around that, and those things—the tensions that have arisen over this, over this suit, has caused some hesitation. But I believe if we had the full steam ahead to work on the adult level, working the white and Negro citizens together on all these problems, which we have many of them, I think it would be of invaluable benefit to us when the time comes that we attempt desegregation.

Q Aren't your hands pretty well tied from higher-ups as to working with the Negroes on the solution to this problem? Haven't you been criticized yourself for trying to be honest and saying that you had to comply with the Supreme Court decision?

A I think so.

Q And the only ones who are commended are the division superintendents who get out and wave the other flag, is that correct?

MR. WILLIAMS: I don't think that is a proper question, your Hon r.

THE COURT: Well, I think that is true. The gentleman tries to comply with the law and they shut him up. He gets criticized by everybody.

MR. WILLIAMS: The Court might think that. But I don't think Mr. Brewbaker ought to express—

THE COURT: No. I agree as to the others.

THE WITNESS: His Honor didn't insist that I reply.

MR. WILLIAMS: I believe that is all.

CROSS-EXAMINATION

BY MR. HILL:

Q Mr. Brewbaker, I want to ask you one or two questions. I think in your affidavit you made mention of the

fact that the level of achievements among Negroes in the Norfolk schools is lower than that of the white children?

A That is correct.

Q Fourth grade?

A That is correct, Mr. Hill.

Q And this situation developed under the segregated school setup, did it not?

A That is correct.

Q And you also stated that you have read extensively of the literature on the subject and you do know from the literature, do you not, that segregation itself is given as one of the bases for causing a lower achivement on scores, is it not?

A I am not quite sure, Mr. Hill, about that. I wouldn't like to say.

Q Let me ask you this: Have you read in your literature that if you are going to segregate them on classes, children of the lower economic, white lower economic basis will score lower than children of parents of a high economic level, do they not?

A Usually hat is true, sir.

Q So, as I say, there are a number of factors that cause this lower score other than race, are there not?

A I don't believe, Mr. Hill, that I have tried to show that race caused that. I don't believe.

Q I am not charging you with it, Mr. Brewbaker, but your affidavit states that?

A It states it.

Q And so frequently people, not thinking about these things, do attribute them to race. I merely wanted to get the record clarified.

A I believe I stated what I thought were the most significant factors in this. Now I may be wrong but in my opinion, I feel it's not—it's other factors such as home conditions, cultural development and things of that kind. But wo do know from tests—the easiest way for me to say this is this: If you take the upper three quarters of the white children and take the Negro children, one fourth of the Negro children will fit in with the upper three quarters of the white. Therefore, that leaves three quarters of the Negro children that fit in with the lower quarter of the white, acedemically speaking, along about the sixth and eighth grades we find that is true. On the average now—of course, that gives you one fourth against three fourths in the upper, well, one of them is three quartile and the other is one quartile.

Q You do have some non-segregated schools? You have some white and Negro children attending schools in the city of Norfolk on a non-segregated basis, do you not?

A You are probably speaking of the cerebral palsy center. The white and Negro children attend that center for therapy. Now, after the therapy, for the cerebral palsy deficiency, the Negro children go back to their respective schools. We don't keep any Negro children there in class.

Q I wasn't asking you necessarily about public schools.

A I see. Yes. I thought you were speaking of public schools.

Q In the city of Norfolk there are some schools where Negro and white children attend the same school?

A That is correct.

Q And so far as you know, have there been any disturbances over it?

A The disturbances have not been brought to my attention if there are any.

THE COURT: Are they, however, selected students?

THE WITNESS: Your Honor, I don't know. I know at the Catholic High they have about eight I think. And the chances are—I don't know. But there are very few.

Q In your efforts for the promotion of this adult program that you were talking about, is there anything in the program that reaches the rank and file of people? I noticed you made mention of your advisory committees and things of that nature where you get, I assume, people who are civic minded among both white and Negroes who work on such committees. But is there anything that reaches down to the rank and file?

A I would say up to this time, Mr. Hill, that probably we are selecting the leaders in both groups for those committees. We have not — It occurs to me that we could extend that. But up to this time I would say that the leaders in both groups have been selected.

THE COURT: Are those educational groups dealing with this desegregation problem as such?

THE WITNESS: We have not had a committee, your Honor, dealing with desegregation.

THE COURT: That is dealing with the selection of locations for schools and enlargement of curriculum and so forth?

THE WITNESS: Improvement of buildings. Improvement of the general program.

Q (By Mr. Hill) Even under existing law, do you know any reason why the School Board, or certainly the

City Council of Norfolk, could not promote an educational program designed to reach the rank and file of the citizens to develop a better understanding of this problem?

A I don't know of any reason, Mr. Hill. It seems to me that would be an approach. You mean on the adult level?

Q I am talking on the adult level, yes, sir.

A I think that would be the approach.

Q But so far as you know, nothing has been done along that line?

A Well, there are some committees I think in the city, I believe there are some committees in the city dealing with that, I believe in recreation and other aspects of the city. I believe they have some. I am pretty sure they do.

Q Are they what you might call civic minded groups that get together, or are they official bodies?

A I would say both.

BY THE COURT:

Q Mr. Brewbaker, if the law with respect to the automatic closing of schools and the cutting off of funds were changed, while I am appreciative of the fact that any situation involving any desegregation is going to present some problems, are you of the opinion that over a period of time that those problems would not solve themselves? I am not speaking of the isolated instance of maybe even blood shed. I am speaking of over a gradual period of time.

A Your Honor, I believe that gradualism is the way it should be done. Of course, the cutting off of funds is one great obstacle. That would, I think, would practically wreck our school system if we lost that much money. And the other, as I said before, I believe if we had more time, and I think Mr. Hill has brought out his idea of working more

extensively on the adult level. Because if you can get the adults of the community to agree to that, this is something that must be done, and when the chips are down I think the people of Norfolk will work on it. I think if we could work longer on the adult level, that when we did have to make this transition, it would be much, much easier and more successful.

Q But, everybody is afraid to say anything, isn't that true?

A We are kind of between the devil and the deep blue sea, aren't we?

By Mr. Hill:

Q Let me ask you one more question, Mr. Brewbaker. As a person who has given some intelligent thought to the problem, is it not true that even if all the Virginia authorities said "Let's desegregate immediately," would it not be a gradual situation due to residential situation and all that sort of thing?

A I think so. I think it should be.

Q I am asking you, as a matter of fact, would it of necessity be gradual?

A Mr. Hill, I think we could make it more gradual or less gradual. Of course, if you say desegregate everybody in all grades and all schools at one time, in some spots it wouldn't be too gradual. But I think we ought to see to it that it is gradual.

Q But I say if you look at it as an overall problem, looking at it city-wide, it would still be gradual?

A You mean in the city of Norfolk?

Q Yes, sir.

A I think it would be fairly gradual.

MR. HILL: That is all, sir.

MR. WILLIAMS: I have no further questions, your Honor.

THE COURT: Let's take a brief recess.

(At 12:25 p. m., a 15-minute recess was taken.)

AFTER RECESS

MR. WILLIAMS: Your Honor, we rest.

THE COURT: Any rebuttal? Or do you care to call either Mr. Dalby or Lieutenant Racine who submitted affidavits?

MR. MADISON: Your Honor, we would like to call Lieutenant Racine, sir.

Testimony of R. P. Racine

CROSS-EXAMINATION

BY MR. MADISON:

Q Lieutenant Racine, in your affidavit in paragraph 2 you state that the rate of juvenile delinquency among Negroes is two and a third times as high as among whites, that is correct, I believe?

A That is correct.

Q And in reading your affidavit further, in paragraph 3 you said this: "Thus, to have the authority to seek out and put an end to truancy is an asset of great importance in our efforts to combat existing delinquency and to prevent it in the future." Do we understand by that, then, that if you had the authority to enforce the compulsory educational law that it would be a great deterrent in future delinquency?

A I do.

Q You also said this: "In my opinion, integration in the

schools at this time or in the near future will inevitably give rise to increased delinquency for the reasons set out." Is it your further opinion that if the schools were integrated and the compulsory educational law were in force that we would have less delinquency?

A Well, I contend that certain problems would arise with the integration.

Q What are some of those problems?

A Well, it's hard for me to actually say what the problems would be other than skirmishes, or as to what proportion these things may go to, I couldn't say. I can only visualize, as a police officer, certain problems that would arise with the integration by the certain youngsters in our junior high school, junior and senior high schools especially.

Q You mean just fights by the children?

A Between the children, yes.

Q Do you not have fights also now?

A The trouble between the races, no. We have minor skirmishes among themselves. But the trouble, between each other.

Q Are you familiar with the Catholic High School?

A I am.

Q Do you know of any violence or any major skirmishes that have taken place there?

A I do not.

Q And, as far as you know, everything is peaceful?

A As far as I know.

MR. MADISON: We have nothing further.

THE COURT: You wish anything more, Mr. Williams, from Lieutenant Racine?

MR. WILLIAMS: That is all.

THE COURT: Is there any request to cross-examine Mr. Dalby?

MR. ASHE: No, your Honor.

THE COURT: Any further rebuttal then?

MR. ASHE: No further rebuttal.

THE COURT: All right, gentlemen, glad to hear your arguments.

MR. HILL: We are perfectly willing to submit it, your Honor.

THE COURT: You care to argue it, Mr. Williams?

MR. WILLIAMS: Mine would not be called an argument because I can make no better argument than has been made on the witness stand by Mr. Brewbaker. I do submit that, as he stated, no final order should be entered at this time but he should be given an opportunity to work in good faith as he has been doing.

THE COURT: There is no question about Mr. Brewbaker's good faith, in that sense.

MR. WILLIAMS: In order to try to get this thing integrated with as least trouble and violence as possible. I trust that the Court —

THE COURT: What would you suggest? I am perfectly willing if the City of Norfolk School Board—and I have the utmost respect for every member of that body, and I know they are capable—but if the City of Norfolk School Board will present a plan to this Court and say, "Judge, this is the plan that we want to put into effect," and if it is a gradual compliance with the law, that is all I want and I

will approve it; because I have confidence in their ability. But what are you going to do when you have got the leadership so absent? There is just nothing else we can do.

You give me the solution now. You put yourself in my shoes. You are a good lawyer, and you put yourself in my shoes and do the trick.

MR. WILLIAMS: I appreciate the compliment. I rely on Mr. Brewbaker and I have the same feeling about him; when he tells you honestly that he thinks they have done something toward solving this situation and he is going on and do it, that that would have great weight with you as well as with me, and I think no final order should be entered at this time in this case and let the Court see what takes place and how it works out.

THE COURT: Of course, the whole thing stays right in Richmond and in the Legislature. That is the answer; and it is the only answer. And as long as that situation exists—I dare say if it hadn't been for what happened at the extra session of the General Assembly the Norfolk City School Board could have come in here long before now and said, "Judge, here is a plan. We think it is reasonable," and they would have had no trouble. They are not going to have any trouble with the cooperation of the federal judges if there can be cooperation. But the Legislature has made whipping boys out of the school boards and the division superintendents. They are the whipping boys. The division superintendents and the school board members are the ones that have to answer ultimately to this Court for any process of contempt, which is a very unfortunate situation that the federal judges have been placed in. The leadership of the State doesn't have to answer.

MR. WILLIAMS: I can only say that is not my fault in any way.

THE COURT: It is not mine either and I certainly didn't ask for this one, I can tell you frankly.

MR. WILLIAMS: Well, that is all I have to say. I think Mr. Brewbaker expressed my views about it as well as anybody could express them.

THE COURT: Anyone else care to argue it? I think if not, gentlemen, the situation is substantially the same as it was with the Newport News case; and the Court will prepare a more formal memorandum in connection with it. It will provide for an injunctive decree similar to the Newport News situation. Again I say, if prior to the time of the effectiveness of the injunction that there is in good faith compliance, or an effort to comply, the Court will certainly recognize it. I realize that that puts the School Board in the position that they must elect whether they are going to operate their own school system according to the present system of laws, or whether they are going to sit back and do nothing and wait for the Legislature and see what, if anything, they do. If there is a plan submitted prior to August 15, 1957, and I am confident the plan would be reasonable even though it would undoubtedly only be gradual desegregation, I can say to you that the Court will undoubtedly approve that plan if it is submitted and if the School Board says "We are going to carry it out regardless of what the Governor of Virginia and the Legislature says about it." In that way they can be completely protected and that is the only way that I can see that they can be completely protected, because, unless the injunctive decree is stayed, which I am sure it will be because the procedure is to appeal them all, and unless the decree is stayed by an appellate court in a proper manner at the time September rolls around, if there is then any discrimination in the handling of the request of the plaintiffs in connection with the admission to

schools, we come down to the ultimate issue, which is the ultimate issue I understand some of the leaders of Virginia have said they would like to see, whether a federal judge has the nerve enough to punish for contempt, and I can assure you that the order will have to be complied with. I might be reversed but the order will have to be complied with and there is no sense in fooling anybody about it. It is a difficult problem. But the way things exist now, we have a direct conflict with the leadership in the State and the judicial powers of the United States, and I didn't make those powers. I am not responsible for them in any way. I am just here to carry them out. There is no lawyer in this courtroom, and there is no lawyer in the country as a matter of fact with any degree of intelligence—even former Justice Byrnes from South Carolina, I noticed, stated that he conceded that every judge, both federal and state, was bound by the Supreme Court decision in Brown against the Board of Education. As long as that situation exists, unless there is a constitutional amendment, or unless there is in some manner a reversal of the Supreme Court decision, there is nothing else for me to do in these cases except carry them out, and we might as well put our shoulders to the wheel and admit that that is the factual situation. I think the City of Norfolk, for one, has endeavored to try to formulate some ideas and plans but, as Mr. Brewbaker so adequately described, the Legislature put everything in reverse when they met in September. The only thing I am glad to say, that I noticed that none of the Norfolk members of the General Assembly joined in that particular action, and maybe they perhaps will be able to influence the Governor that the urgency of this situation is such that the Legislature should be reconvened. I have nothing to do about that.

I am going to prepare this this afternoon, gentlemen, if

you care to see it before you leave. I think it will be ready about three o'clock.

Nothing further, Court will adjourn until tomorrow morning at ten o'clock.

AFFIDAVIT OF J. J. BREWBAKER

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

John J. Brewbaker, being first duly sworn, deposes and says:

I was born in Botetourt County near Buchanan, Virginia, on June 6, 1895. I attended the public schools of Botetourt County and graduated from the Buchanan High School in 1915. I received the B. A. Degree from Roanoke College, Salem, Virginia, in 1918. I did graduate work, majoring in school administration, at the University of Virginia and received the M. A. Degree in Education in 1939. I have done graduate work in education also at Teachers College, Columbia University.

I began my career by spending six months in the United States Army in 1918. After the war, I returned home in November, 1918, and became Assistant Cashier in the Bank of Buchanan, which position I held for almost four years. I served as Principal of the Buchanan High School, from which I had graduated earlier, from 1922 to 1926. During the school session of 1926-27, I served as Principal of the St. Paul High School in Wise County, Virginia.

I came to Norfolk in September, 1927, and for the past thirty years, I have served in administrative positions in the Norfolk City School System. From 1927 to 1939, I served as

Principal of the Robert E. Lee School. From 1939 to 1942, I served as Principal of the James Madison School and Principal of the Maury Night School. I also taught from 1928 to 1939 in the Maury Night School. During the 1942-43 school session, I served as Business Manager of the School System and continued to serve as Principal of the Maury Night School. From 1943 to 1949, I held the position of Assistant Superintendent of Schools. I was the only Assistant Superintendent during these years and performed many and varied duties. I was elected to the superintendency of the Norfolk City Schools effective July 1, 1949, and I have served continuously from that time in this capacity.

Comparison of Growth in White and Negro Schools

In an attempt to give a full picture of the growth and improvement in the Norfolk School System and to show that equal facilities, services, and opportunities are now offered the children of both races in segregated schools, I have gone back twenty years and shown, in Exhibit 1, some comparisons of significant data. The school year 1956-57 could not be included since these data are based on the average for the year.

It is interesting to note that the enrollment as of December, 1956, was 28,376 white, 13,574 Negro, and 41,950 total. The average daily attendance (ADA) was 26,822 white, 12,544 Negro, and 39,366 total.

The figures for the present school session also show that the percentage of the Negro school population is increasing again. In 1936-37, we had 35.3 per cent in the Negro schools which increased to 40.8 per cent in 1950-51. Then there was a small decrease to 38 per cent in 1952-53, a slight increase to 38.8 per cent for both 1953-54 and 1954-55. Annexation of the Tanners Creek area of Norfolk County in January,

1955, caused a drop in the percentage of Negro school children from 38.8 in 1954-55 to 31 per cent in 1955-56. We received about 12,000 pupils through annexation with only about 1,000 of them Negro. A rise in the Negro percentage is again indicated in December, 1956, with 32 per cent Negro.

The following are some additional examples taken from Exhibit 1:

Average Teacher's Salary

The average teacher's salary in 1936-37 for white teachers was $1365.40 and for Negro teachers was $880.04. In 1940-41, the average salary for white teachers was $1608.63 and for Negro teachers $1110.00. In 1945-46, the average salary for white teachers was $2322.09 and for Negro teachers $2258.92. In 1950-51 the average salary for white teachers was $3044.00 and for Negro teachers was $3021.00. Then in 1955-56, the average salary for Negro teachers exceeded that of the white teachers. The white teachers' average salary was $3704.04 while the Negro teachers' average was $3863.81. In twenty years, the white teachers' salary increased by 270 per cent and the Negroes by 440 per cent.

Per Pupil Cost

During the same period, the per pupil cost ranged as follows: In 1936-37, the per pupil cost was $56.88 for white children and $33.40 for Negro children. In 1940-41, the per pupil cost was $62.30 for white and $41.32 for Negro. In 1945-46, it was $144.09 for white and $111.39 for Negroes. Then in 1950-51, the cost for the white children was $211.64

and $186.12 for the Negro children. In 1952-53, the Negro per pupil cost exceeded the white, $217.28 for white and $217.55 for the Negro, and this increase has become greater each year. In 1955-56, the white per pupil cost was $229.19 and the Negro per pupil cost was $237.44. In the twenty-year period, the per pupil cost in the white schools increased by 400 per cent and the Negro by 700 per cent. This is the annual per pupil cost and includes current operation; capital outlay and debt service are not included.

Teacher Load

In 1936-37, the white high schools had an average teacher load of 30.0 pupils and the Negro high school had an average of 33.3. In the white elementary schools, the average was 30.5 and 35.4 in the Negro schools. The average teacher load in the white schools was 30.3 and in the Negro schools 35.1. This situation had gradually improved so that by 1951-52, we had in the white high schools a teacher load of 19.8 and in the Negro high schools 19.0. In the white elementary schools, the load was 25.4 and in the Negro elementary schools the load was 27.7, giving an overall average in the white schools of 23.5 and in the Negro schools 24.5. In 1955-56, the white high schools had an average teacher load of 20.5 and the Negro high schools had an average teacher load of 18.6. In white elementary schools, the load was 26.7 and in the Negro elementary schools the load was 28.4. The overall average in the white schools was 24.7 and in the Negro schools 25.1. The difference in average teacher load for white and Negro teachers is negligible. Teacher load means the number of pupils a teacher has in his class. We take the total number of pupils and divide by the total number of teachers to get the average teacher load.

Number and Value of Buildings

The number of buildings in the secondary schools has increased from three in 1936-37 for white children to six in 1955-56, and for Negro children from one to three. In the elementary schools, the buildings have increased for white from 22 in 1936-37 to 28 in 1955-56, and from 12 for the Negro in 1936-37 to 17 in 1955-56. Annexation of the Tanners Creek district in 1955 added two white high schools and six white elementary schools and only one Negro elementary.

The value of the high school buildings has increased from $1,521,970 in 1936-37 for white to $12,561,276 in 1955-56. For Negro children, the value of the buildings has increased from $334,528 to $4,976,032 during the same period. In the elementary schools, the value of the buildings for white has increased from $1,991,376 in 1936-37 to $17,063,136 in 1955-56. The value of the Negro elementary schools has increased from $441,102 to $7,324,368 during this period.

The overall valuation of school buildings has increased from $3,513,346 in 1936-37 for white to $29,624,412 in 1955-56. The overall valuation of the Negro buildings has increased from $775,630 to $12,300,400 during this period.

The percentage of Negro pupils in 1936-37 was 35.3 and the percentage of the value of buildings was 18.0. In 1955-56, the percentage of Negro pupils was 31.0 and the value of the buildings was 29.3. The value of white buildings over a period of twenty years increased by a little more than eight times while the value of Negro buildings over the same period increased about sixteen times.

Curricula in the White and Negro Schools

In the Norfolk Public Schools curriculum evaluation and construction are considered on both a city-wide and school

basis. The system-wide curriculum presents a general pattern of offerings in both elementary and secondary schools. This program is enriched by appropriate supplementary curriculum programs in the individual schools. Through workshops, in-service programs, and system-wide committees, curriculum production has moved on a common front which negates any consideration of differentiation in curriculum offerings between the two races.

Instructional materials—audio-visual aids, textbooks, supplementary materials, supplies, and library services—are supplied on an equal basis for both white and Negro schools. Most supplies are considered on a per pupil basis.

Supervision of both curriculum and instruction is supplied equally to white and Negro schools. No differentiation is made in assigning special resource teachers in the white and Negro schools. Negro teachers and principals are represented proportionately on all curriculum committees.

Two night schools are operated for adults, courses are provided in elementary English, arithmetic, and all academic subjects. Vocational and trade courses are offered. Business courses are included and courses are offered for those who wish to graduate from high school. Those coming from foreign countries may study the fundamentals in our night schools to prepare them to pass the Naturalization tests for American citizenship. Anyone may take any courses to improve himself in the work he is doing and prepare for a new occupation.

These courses are conducted at Maury High for white adults and at Booker T. Washington High for Negro adults. The enrollment is about the same in each from 1,200-1,800 and the courses offered are practically the same. Any course will be offered in either night schools where there is a demand for it. Whenever as many as twelve persons apply for a course, we arrange to give it.

Exhibit 2 gives a comparison of the curriculum offerings in the white and Negro elementary and high schools. A casual perusal of this exhibit will show that the offerings in the white and Negro schools are practically the same. Our policy is to offer any acceptable course where there is a demand and need for it.

If desegregation were ordered in Norfolk at this time under the existing State laws, the result would be chaotic.

1. *Financially.* Our school budget for 1957 in round figures is $10,000,000. This revenue is derived from three sources; namely, State about 23 per cent, the Federal government about 12 per cent, and the City of Norfolk 65 per cent. The total State funds anticipated for 1957 amount to $2,360,822.74. If we are forced to desegregate, and even if we are allowed eventually to open the schools after they are closed by the State, we would lose this amount.

The following eliminations would probably be necessary:

Supervision	$124,010.00
Adjustive Services	55,610.00
Night School	46,000.00
Special Education	44,300.00
Education for Homebound pupils	18,760.00
Pianists	4,000.00
Part-time Vocational Instruction	16,025.00
Cerebral Palsy Center (Private sources of revenue deducted)	11,060.00
Clerk-librarians	12,600.00
All co-ordinate activities (Nurses, doctors, dentists, child labor administrator)	135,070.00
All funds for equipment	115,750.00

Reduction of teaching staff by twenty-five per cent	1,696,419.00
Reduction of amount for instructional supplies by fifty per cent	81,250.00
Grand Total	$2,360,850.00

At the present time, Norfolk has one of the best school systems in that group of fifty-six cities in the United States and Canada over 200,000 population. The superintendents in this group have two meetings each year to exchange ideas and practices. In addition to this, I have visited many of these cities and have firsthand knowledge of their school programs. Frankly, if we lose the State funds and have to eliminate those items listed above, including twenty-five per cent of our teachers, I dread to think of the type of school system that could be operated. I do not see at this time how it could be done at all.

2. *Academically.* According to the results of achievement tests, there is a difference in the achievement of white and Negro children in the same grade. It has been found from achievement tests that Negro sixth grade pupils achieved on approximately the level of high fourth or possibly fifth grade pupils and their eighth grade schoolmates made scores equivalent to those expected of typical sixth grade pupils.

Three-fourths of the white sixth grade pupils make higher scores on the total achievement test than three-fourths of the Negro sixth grade pupils. Similarly, three-fourths of the white eighth grade pupils attain a higher rank on the total achievement test than three-fourths of eighth grade Negro pupils.

This means that in the sixth and eighth grades, one-fourth

of the Negro children rank with the upper three-fourths of the white, while three fourths of the Negro children rank with the lower one-fourth of the white.

Despite the fact that Negro children in Norfolk have equal facilities, services, and excellently trained teachers, they have not attained a state of readiness to absorb school classroom work at the same rate and at the same age level as white children. Norfolk is maintaining public education at a high level for both races. Since the facilities, services and appurtenances are of uniform high quality, the cause of the lack of achievement must be found elsewhere; for example, the degree of cultural and home environmental development.

When all the angles of the problem are considered, under the present State laws, the road ahead, if desegregation is ordered now, is filled with pitfalls and confusion. A situation most likely would develop similar to that which now exists in Washington, D. C. Until clarification of the laws is brought about, a superintendent of schools knows not how to proceed. Any locality that is forced to make the change under these conditions is bound to commit irreparable damage to its school system.

In a review of the changes that have been taking place in some of the border states, we find the transition has required many years. Reports on some of the recent experiences of twenty-four communities in states bordering the South as they move from racially segregated toward integrated public schools are given in a book, "Schools in Transition," by Williams and Ryan, published by the University of North Carolina Press in 1954.

It would require too much time and space to treat each of the twenty-four communities. These studies were made of communities in four states that required integrated schools by state law. In Ohio, the law requiring integra-

tion was enacted in 1887; in Indiana, it was enacted in 1949; in Illinois, the law assured desegregation in 1945; and in New Jersey by constitutional convention in 1947 to become effective January 1948. The twenty-four localities in these states are still struggling with the problem.

For seventy years, some communities in Ohio have been working with the problem. Cincinnati is one of the cities in Norfolk's population group and fairly comparable. Compulsory segregation of public school children was prohibited in 1887 by state law and by the city's own policy. The gradual approach is being used in Cincinnati and these other communities. "The legal framework within which an integrated school system could develop was available for many years before the local mores and customs changed to permit such a move."[1]

Much preparation must be made to create a climate and a working relationship between the races in the community before integration is begun in the schools if it is to be successful. In Virginia, however, the legal framework makes even the approach to an integrated school system impossible.

In 1949, in order to increase the efficiency in the administration and supervision of the school system and to save the time of the Superintendent for some of his many other duties, our groups of white and Negro administrators were combined. Since that time, we have held administrators conferences as one group. At the present time, we have approximately one hundred principals, supervisors, directors, and assistant superintendents in this group. Strictly professional programs are conducted, meeting for one week prior to the opening of school and continuing to meet each first Wednesday morning during the school session. These

[1] *Schools in Transition.* University of North Carolina Press. 1954, p. 48.

meetings have resulted in a most wholesome working relationship of our administrators both white and Negro.

About the same time, our in-service education summer workshops were established; one for the white and another for the Negro teachers. For the past two summers, a combined workshop has been conducted, which both white and Negro teachers attended on a strictly voluntary basis.

The Teachers' Advisory Council, made up of both white and Negro teachers and administrators, appointed by the Presidents of the two education associations, meets monthly in the Board Room of the Administration Building. This group brings to the attention of the Superintendent problems and suggestions affecting the teachers and the school system.

From time to time, citizens' committees have been formed composed of both white and Negro citizens to study special school problems. I feel that both races will benefit if we are allowed to continue working in this manner on the adult level. It is my opinion that neither race is ready for integration in this community and that any attempt to commence integration in the near future will greatly retard, if not destroy, the progress which has been made, by a voluntary course of action over the preceding years.

(s) J. W. Brewbaker
Affiant

Subscribed and sworn to before me, this 12th day of February, 1957.

Nancy B. Ferebee
Notary Public

My commission expires: August 14, 1959.

AFFIDAVIT OF CALVIN H. DALBY

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

Calvin H. Dalby, being first duly sworn, deposes and says:

1. I am fifty-seven years of age and have lived in the City of Norfolk all my life and am now Director of Public Safety for the City of Norfolk, and have so acted since December 11, 1946. As such Director I am, pursuant to the provisions of the Norfolk City Charter, the executive head of the Division of Police. My duties are such that I am familiar with the racial problems and relations in the city.

2. Today we have satisfactory race relations in Norfolk, the result of a steady improvement. This improvement has developed gradually over a period of many years and is the result of a continuing and voluntary effort on the part of persons of both races to condition the thinking of each race toward a better understanding of both their mutual and separate problems. It is my sincere hope that no action will be undertaken that will interfere in any way with the present racial situation.

3. With my knowledge of the local racial situation it is my considered opinion that any enforced integration of the public schools in the city, at the present time or in the near future, would create considerable tension between the races and go a long way toward breaking down, if not destroying, the satisfactory racial relations that have existed here and which we now enjoy. Under present conditions, integration would cause friction between the races, resulting inevitably in some personal conflicts, the extent of which cannot be estimated. Any increase of violence will of course affect the safety of the people of this community both white and colored.

4. The elimination of compulsory school attendance for integrated schools would eliminate, from police authorities, one of the best methods now used in the furtherance of the prevention of juvenile discord and misbehavior.

(s) Calvin H. Dalby
Affiant.

Subscribed and sworn to before me, this 12th day of February, 1957.

(s) Nancy B. Ferebee
Notary Public.

My commission expires: August 14, 1959.

AFFIDAVIT OF LT. R. P. RACINE

STATE OF VIRGINIA,
CITY OF NORFOLK, TO-WIT:

Lt. R. P. Racine, being first duly sworn, deposes and says:

I am 46 years of age, having been born in Grand Rapids, Michigan. I have lived in Norfolk since the year 1931 and since 1941 have served with the Police Department of the City of Norfolk. I was appointed to my present position of Commanding Officer of the Youth Bureau in the year 1949 and have served continuously in that capacity since then. As such, it is my duty to direct and supervise the operations of the Youth Bureau in preventing future juvenile delinquency and handling as they arise all cases of offenses by and against juveniles in this city.

The records of known offenses among juveniles disclose that those committed by negroes, who comprise only about 30% of the total juvenile population of Norfolk, constitute on the average just about 50% of the total offenses. Thus, we have in Norfolk, among the negro juveniles a density of offenders, or percentage of delinquents, about 2-1/3 times as high as among the white juveniles.

It is a fundamental principle upon which we work that truancy, or idleness, is the first step toward delinquency. Thus, to have the authority to seek out and put an end to truancy is an asset of great importance in our efforts to combat existing delinquency and to prevent it in the future. The beneficial effects of compulsory school attendance are not limited to resulting lower rates of delinquency among those children under the age of 16 years subject to its mandate, but are realized in the conduct of older juveniles whose activities, either through continued voluntary attendance, or otherwise, reflect the training received during their years of compulsory attendance. Integration at this time will render inoperative the existing compulsory school attendance law and deprive the police force of one of its strongest weapons against delinquency.

In my opinion, integration in the schools at this time or in the near future will inevitably give rise to increased delinquency for the reasons set out above and to conflicts among juveniles so integrated. The scope or frequency of such disturbances is of course a matter of speculation, but I feel that undoubtedly some increase in police problems would be realized. How quickly such conflicts may be controlled, how successfully they may be isolated and limited, how public feelings may be displayed and what steps may be necessary to attempt to maintain order are unpredictable, but I am aware of the rapidity within which relatively minor incidents can develop into problems of major proportions.

It is also apparent from our records that there has been little or no problem of sex offenses or violence between members of the different races, and this, in my opinion, can be accredited to their segregation, particularly in the schools. I feel that neither race is now or will in the near future be prepared to exercise integration in the schools peacefully and in a manner that would not cause an increased police problem.

(s) R. P. Racine
Affiant

Subscribed and sworn to before me, this 12th day of February, 1957.

(s) Nancy B. Ferebee
Notary Public

My commission expires:
August 14, 1959.

MEMORANDUM OPINION

On January 11, 1957, this Court filed a memorandum opinion denying motions to dismiss, holding that Chapter 70 of the Acts of Assembly of Virginia, Extra Session of 1956, was unconstitutional, and that plaintiffs were not required to exhaust any so-called administrative remedy allegedly afforded by Chapter 70.

The matter now comes before the Court on the merits of the controversy. The evidence of the plaintiffs was restricted to three witnesses who testified that they were citizens of the United States, citizens of Virginia, members of the Negro race and having children in attendance at segregated

public schools in the City of Norfolk which were maintained as such by the School Board of the City of Norfolk during the time of the institution of this action and the pendency thereof. It was then stipulated that all plaintiffs were similarly situated. The only other evidence presented by the plaintiffs was the testimony of the Administrative Assistant to the Superintendent of Schools, Walter W. Brewster, who also serves as Clerk of the School Board of the City of Norfolk. It appears that a petition bearing the signatures of more than 200 parents was filed with the School Board on July 14, 1955, at which time the School Board issued a statement which was not introduced in evidence but which generally indicated its obligation to comply with the decision of the Supreme Court of the United States in *Brown v. Board of Education.* Recognizing that the Norfolk City School system was dependent upon the State of Virginia to the extent of approximately 23% of its revenue, the School Board declined to take any action at that time pending further legislation to be enacted by the General Assembly of Virginia. Since July, 1955, no formal action has been taken by the School Board of the City of Norfolk to comply with the desegregation ruling of the Supreme Court of the United States, although on May 12, 1956, the School Board requested the Governor of Virginia to convene the General Assembly for the purpose of considering the educational problems arising out of the Supreme Court decision. The legislation subsequently enacted by the General Assembly of Virginia at its extra session held in September, 1956, is adequately referred to in this Court's memorandum heretofore filed on January 11, 1957.

The testimony of the defendants was submitted in the form of an affidavit from Lieutenant R. P. Racine, Commanding Officer of the Youth Bureau of the Police Department in the City of Norfolk, and an affidavit from

alvin H. Dalby, Director of Public Safety for the City f Norfolk. These two affidavits as supplemented by Lt. Racine's testimony given in open court do not play any significant part in the Court's determination of the situation presented.

John J. Brewbaker, Division Superintendent of the Schools of the City of Norfolk, submitted an affidavit with accompanying exhibits and further amplified the same by testimony. The sum and substance of the School Superintendent's evidence is that the City of Norfolk has substantially complied with the "separate but equal" doctrine, which was the applicable law prior to the decision in *Brown* v. *Board of Education*. The City of Norfolk is to be commended for its rapid strides in bringing about an equalization in physical equipment, curriculum, teacher load, and teachers' salaries. If the "separate but equal" doctrine were now in existence, there would be no grounds for any relief to be afforded these plaintiffs.

This action was heard by this Court on February 12, 1957, immediately following the Court's opinion in the case of *Atkins* v. *School Board of the City of Newport News, et al*, Civil Action No. 489, Newport News Division, heard on February 11, 1957, at which time the Court delivered an opinion from the bench. Save and except the references to the local conditions existing in Newport News, the Court by reference incorporates in this memorandum opinion the language set forth in the Atkins case.

While the percentage of Negro to white population in the City of Newport News is considerably higher than in Norfolk, it would appear that, with one area excepted, the City of Newport News will be less affected by desegregation of the public school system. According to the testimony of the Division Superintendent, there are some localities in the City of Norfolk which will create individual problems in

the elemenetary school system, particularly at the Patrick Henry School and the Gatewood School where the percentage of white to colored students would be approximately four to one in Patrick Henry and eight to one in Gatewood, with the preponderance of the student body being white, which allocation is based upon the assumption that the school children are assigned only in accordance with normal geographical consideration.

As this Court stated in the Atkins case, there is no particular law which prevents reasonable reallocation of school areas for geographical purposes and it is logical to assume that even the foregoing percentages will be somewhat reduced. Additionally, as to the Patrick Henry School, there is a redevelopment and housing plan now in its early stages which, if carried through to its completion, will substantially reduce the number of colored children who would ordinarily be assigned to Patrick Henry School.

With respect to the junior high schools covering the seventh, eighth and ninth grades and the senior high schools providing education for the tenth, eleventh and twelfth grades, there will undoubtedly be some mixing of the races, but the Division Superintendent testified that, in his opinion, the percentage of white to colored children would probably be in excess of twenty to one in schools now occupied only by white children. In a frank and honest statement the Division Superintendent conceded that, but for the existence of the recently enacted laws of the State of Virginia, the City of Norfolk by a process of gradual desegregation could achieve good faith implementation and compliance with the Supreme Court decision without any insurmountable difficulties. However, as the Division Superintendent so aptly states, the Legislature's recent action has tended to forestall any action which could have been taken by the local school boards to the end that compliance with the Supreme Court opinion

may have been effected in this area. Faced with this dilemma, the Division Superintendent and the able and intelligent members of the School Board of the City of Norfolk are at a loss as to how to proceed.

When the Supreme Court rendered its decision in *Brown v. Board of Education* on May 17, 1954, and thereafter supplemented the same in 349 U.S. 294, it apparently did not contemplate that the various state legislatures would enact laws taking away from the local school boards the right to make assignments of pupils, as well as providing for the automatic closing of schools in the event of any mixing of races and the automatic cutting off of state funds if the mixing of races occurred in any school, whether by action of a pupil placement board or by any court order. Now that this situation has been presented, this Court cannot believe that the Supreme Court intended that the effect of its decision could be completely destroyed by action of the State Legislature. If this Court is incorrect in this conclusion, the Supreme Court decision is meaningless and may be totally disregarded. If this Court is correct in its ruling, then it follows that the School Board, the Division Superintendent, and all parties directly or indirectly operating, controlling, directing, or supervising the school system are held responsible for the good faith implementation of the Supreme Court's decision. The General Assembly of Virginia has effectively placed the local school boards and the division superintendents in the unenviable position of being required to answer to a court order, or causing the automatic closing of schools with the cut off of all State funds. The issue should be met properly at this time in order that the matter may be clarified.

In their individual capacities and as good citizens of the City of Norfolk, none of the members of the School Board nor the Division Superintendent should be criticized. Un-

fortunately, the requirement of good faith implementation extends to them regardless of the leadership which may exist throughout the State. The problem in the City of Norfolk could be readily solved with a minimum of mixing of races if the local School Board and its able Superintendent were afforded any reasonable degree of cooperation from the General Assembly of Virginia and the leaders of this Commonwealth.

Finding as I must that there has been no showing of good faith implementation by the defendants in this case, irrespective of the reasons therefor, the Court is required to restrain and enjoin the defendants, their successors in office, agents, representatives, servants and employees, from refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to and enrollment and education in such school. The injunction order to be entered shall be effective with respect to all public schools in the City of Norfolk as of August 15, 1957, to become operative at the beginning of the 1957-58 session, that is, in September of 1957. In the event the execution of the injunctive decree is suspended by reason of the action of any appellate court, the Court is of the opinion that it would be unwise to permit desegregation during the existence of any normal school year, as this would require the reallocation of children already in specific grades and classes. In the event the Legislature should meet in the interim period and enact laws which may be constructive as distinguished from obstructive in nature, or in the event the School Board of the City of Norfolk elects to promulgate a plan on or before August 15, 1957, and present the same to the Court for its approval, the Court will consider on appropriate motion any question with respect to gradual desegregation; the Court being of the

opinion that gradual desegregation, beginning September, 1957, with the first, seventh and tenth grades, subject to appropriate provisions for such elementary schools as may continue through the seventh grade, would be advisable.

Counsel shall submit to the Court any request for additional findings of facts and conclusions of law which they desire to be incorporated and made a part of this memorandum opinion. The request shall be submitted on or before February 18, 1957, and counsel shall similarly submit a suggested draft of final decree granting the injunction herein.

(s) Walter E. Hoffman
United States District Judge

Norfolk, Virginia
February 12, 1957

ORDER

This action having come on to be heard on February 12, 1957, upon the complaint, the answer, and evidence offered by the plaintiffs and the defendants, and the arguments of counsel.

Upon consideration whereof, the court being of opinion that the plaintiffs are entitled to the relief sought in their complaint, and having set forth the reasons for its conclusions in a written opinion this day filed and made a part of the record,

It is accordingly *Adjudged, Ordered* and *Decreed*:

1. That the defendants, and each of them, their successors in office, and their agents and employees, be, and they

hereby are, restrained and enjoined from any and all action that regulates or affects, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similarly situated, to and in any public school operated by the defendants.

2. That this injunction shall become effective on the 15th day of August, 1957, and is to be operative beginning with the school term 1957-58 which normally commences in September.

3. That the plaintiffs recover from defendants their costs in this action.

4. That this action remain upon the docket of the court and that the court retain jurisdiction of the same for such future action, if any, as may be necessary therein.

The clerk of this court will send an attested copy of this order to each of the following:

Mr. Victor J. Ashe, Attorney at Law
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Honorable Leonard H. Davis, City Attorney
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Honorable J. Lindsay Almond, Jr.
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Richmond, Virginia

Mr. Henry T. Wickham
Special Assistant to the Attorney General
Richmond, Virginia

(s) Walter E. Hoffman
District Judge

February 26, 1957

operate in practice. The only thing before the District Court was the statute itself; there had been no administrative action as to any particular student, as to any group of students or as to all students.

The Court of Appeals heard the case, of course, on the record before the District Court. It gave two reasons for its decision that Chapter 70 was ineffectual:

> ". . . because of the fixed and definite policy of the school authorities with respect to segregation and because of the provisions of chapter 68 of the Acts of the extra session, which provide for the closing of schools and withdrawal therefrom of state funds upon any departure from this policy in any school."

Let us examine these two reasons.

The first is the policy of the school authorities. They were the Petitioners. The difficulty is that Chapter 70 specifically abolished all authority that the Petitioners might previously have had over the assignment of pupils and conferred that authority on the Pupil Placement Board. That Board had no policy, for it had not had time to develop one. Chapter 70 became effective long after argument of the issue before the District Court and the Pupil Placement Board did not qualify for office until a date after the statute became effective. The only policy was that of people without a vestige of authority. This argument assumes that Chapter 70 will be administered in an unconstitutional manner before any administration had started.

The second reason given is Chapter 68 (V. 53). It is stated that this provides for withdrawal from the local schools of State funds if schools are integrated. That is in fact accomplished by Chapter 71 (V. 3). A similar provision was enacted by South Carolina at the same time that it adopted a pupil placement plan. The Court of Appeals

upheld the South Carolina plan in *Hood v. Board of Trustees*, 232 F. 2d 626 (4th Cir. 1956), *cert. denied*, 352 U. S. 870 (1956). The Court does not tell us why pupil placement plus removal of State funds is constitutional in South Carolina but unconstitutional in the abstract in Virginia.

This contradiction points up the inadvisability of abstract constitutional determinations. The flat rule of this Court that Federal courts do not make abstract constitutional decisions is met here by a decision of unconstitutionality that is flatly in the abstract. If this Court meant what it said, this decision is entirely contrary to its established doctrine and therefore merits review by this Court.

4.

Abuse of Discretion

In the second *Brown* decision,[3] this Court recognized that no rule of general applicability could be devised by it to lead to the end of segregation by race in the public schools. Conditions were and are so diverse that the case by case method is the only possible solution. The local school authorities and the local courts were left to work out individual solutions, to the extent feasible in the particularity of the locality, within the broad framework of the *Brown* cases.

In these cases, the Respondents presented only evidence that the schools remained segregated and that no firm plans for integration had been formulated by the local authorities. The Petitioners presented cogent and uncontradicted evidence that integration would result in harm to the schools and to the students of both races, and that it would create many more insoluble problems than it could ever begin to solve.

---

[3] 349 U.S. 294 (1955).

The District Court acted without hesitation in these circumstances. Its only suggestion was that school district lines might be gerrymandered (N.N.A. 95-6). It ordered that segregation by race be terminated almost immediately. The Court of Appeals affirmed that action.

The Court of Appeals said that its action does not mean integration. But if segregation by race disappears, only integration is left. And integration means that public education in Virginia will receive setbacks from which it may never recover.

We suggest that the District Court acted with undue impetuosity in decreeing substantially immediate integration. We suggest that such a decree was not the intention of this Court in rendering the *Brown* decision. We suggest that these cases provide this Court with an opportunity to clarify the rules that it meant to establish there and to lead a large section of our country out of the chaos into which the *Brown* decision has plunged it. The time has come, we submit, for this Court to recognize and expound the practicalities of life in these areas and to establish a framework within which public education can continue.

For these reasons, this decision also merits review by this Court.

VIII.

CONCLUSION

The decision of the Court of Appeals in these cases conflicts, we believe, to a very sharp degree with rules of law established by this Court. Those rules ought not to be permitted to lapse by default. They should be reinvigorated by this Court in reviewing this decision. The decision is not

merely erroneous; it reflects a disregard of established legal principles as well as serving to make even more difficult of solution the most difficult social problem presented to the people of this country in eight decades.

The writ of certiorari should be awarded.

Dated August 12, 1957.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

Before PARKER, Chief Judge, and SOBELOFF and HAYNSWORTH, Circuit Judges.

PER CURIAM:

These are appeals from injunctive decrees forbidding racial discrimination in the public schools of Norfolk and Newport News, Virginia, and are controlled in all material respects by our decision in the City of Charlottesville and Arlington County cases. *School Board of City of Charlottesville, Virginia* v. *Allen* 4 Cir. 240 F. 2d 59, cert. den. 353 U. S. 910. It is argued that, on the authority of *Carson* v. *Warlick* 4 Cir. 238 F. 2d 724, the cases here should be dismissed or proceedings therein be stayed until administrative remedies have been exhausted under the recent Pupil Placement Act, ch. 70 Acts of Assembly of Virginia, extra session 1956. As pointed out by the judge below, however, this statute furnishes no adequate remedy to plaintiffs because of the fixed and definite policy of the school authorities with respect to segregation and because of the provisions of chapter 68 of the Acts of the extra session, which provide for the closing of schools and withdrawal therefrom of state funds upon any departure from this policy in any school. *Orleans Parish School Board* v. *Bush* 5 Cir. 242 F. 2d 156, 162, cert. Den. 25 L.W. 3374, ... U. S. .....

It is argued that the court was without jurisdiction of the cases and that only a three-judge court would have had jurisdiction because the constitutional validity of the Pupil Placement Act was involved. This question was not raised, however, in the applications for injunction, which were filed before the passage of that act and which merely sought the protection of constitutional rights in a suit for the hearing of which a court of three judges was not required. *Davis* v. *County School Board of Prince Edward County* 142 F.

Supp. 616. After the passage of the act motion was made to dismiss the cases on the ground that the act provided an administrative remedy which had not been exhausted. The trial judge held, as to this, that the act did not provide an adequate administrative remedy and that it was unconstitutional when considered in connection with other statutes passed at the same time and its manifest purpose. *Cf. Yick Wo* v. *Hopkins* 118 U. S. 356, 373-374. As no injunction was asked or granted against the enforcement of the act or the officials charged with its enforcement, a case for the constitution of a three-judge court was not presented, even though the constitutionality of an act relied on in the motion to dismiss was involved. 28 USC 2281; *Bush* v. *Orleans School Board* 138 F. Supp. 336, s.c. 138 F. Supp. 337, 341, aff. 5 Cir. 242 F. 2d. 156, 164-165, cert. den. 25 L.W. 3374, ... U. S. ..... For like reason, there is no occasion to stay proceedings pending action by the Supreme Court of Appeals of Virginia on a case involving the validity of the act.

It should be noted that the decrees appealed from do not require the assignment of children to particular schools nor do they require mixing of races in any school. They merely forbid defendants from refusing to admit plaintiffs to any school solely on account of race or color. The operative language of the decrees is as follows:

> "1. That the defendants, and each of them, their successors in office, agents, representatives, servants, and employees, be, and they hereby are, restrained and enjoined from refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for

admission to, and enrollment and education in, such school."

In construing very similar language used in his decree in the Arlington case, Judge Bryan used the following language which was quoted by us in our opinion on appeal (240 F. 2d at 62):

> "It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U. S. 483 [74 S. Ct. 686, 98 L.ED. 873] and 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of the Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

That language is applicable to the cases before us, as is the closing language of our opinion in that case wherein we said:

> "The decrees here are not harsh or unreasonable but merely require that the law be observed and discrimina-

tion on the ground of race be eliminated. The Arlington decree expressly states that local rules as to assignment to classes, so long as such rules are not based on race or color, are to be observed, and that administrative remedies for admission to schools must be exhausted before application is made to the court for relief on the ground that its injunction is being violated. While the Charlottesville decree does not contain this express provision, the provision is so eminently reasonable that we may safely assume that enforcement of that decree will not proceed upon different principles."

Affirmed.

APP.

B

APPENDIX B

Chapter 70 of the Acts of Assembly of Virginia, Extra Session 1956

CHAPTER 70

An Act to create a Pupil Placement Board and confer upon it powers as to enrollment or placement of pupils in the public schools and determination of school attendance districts, and to provide for administrative procedure and remedies for pupils seeking enrollment in a school or a change from one school to another school.

[H 68]

Approved September 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. All power of enrollment or placement of pupils in and determination of school attendance districts for the public schools in Virginia is hereby vested in a Pupil Placement Board as hereinafter provided for. The local school boards and division superintendents are hereby divested of all authority now or at any future time to determine the school to which any child shall be admitted. The Pupil Placement Board is hereby enpowered to adopt rules and regulations for such enrollment of pupils as are not inconsistent with the provisions hereinafter set forth. Such rules and regulations shall not be subject to Chapter 1.1 of Title 9 of the Code of Virginia, the short title of which is "General Administrative Agencies Act". The Pupil Placement Board and any of its agents hereinafter provided for shall have authority to administer oaths to those who appear before said Board or any of its agents in connection with the administration of this act.

§ 1a. There is hereby created a board to be known as the Pupil Placement Board which shall consist of three residents of the State appointed by the Governor to serve for terms to expire at the expiration of the term of the Gov-

APP.

A